

**Secretary's Order No.: 2010-F-0020**

**RE: Approving Final Regulations to Amend 7 DE Admin. Code 3702 & 3771,  
*Delaware Shellfish Regulations Pertaining to Oysters:*  
Definitions and Oyster Harvesting Licensee Requirements**

**Date of Issuance: July 9, 2010**

**Effective Date of the Amendment: August 11, 2010**

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") the following findings, reasons and conclusions are entered as an Order of the Secretary in the above-referenced rulemaking proceeding.

**Background and Procedural History**

This Order considers proposed regulations to amend 7 DE Admin. Code 3702 and 3771, *Delaware Shellfish Regulations Pertaining to Oysters: Definitions and Oyster Harvesting Licensee Requirements*. The Department's Division of Fish and Wildlife commenced the regulatory development process with Start Action Notice 2010-12. The Department published its initial proposed regulation Amendments in the April 1, 2010 *Delaware Register of Regulations*, and held a public hearing on Thursday, April 29, 2010. The public hearing record remained open at that time for public comment through April 30, 2010.

Subsequent to the Department's initial publication of its proposed regulation Amendments on April 1, 2010, the Department received numerous public comments concerning the proposed Amendments to *Delaware's Shellfish Regulations Pertaining to Oysters*. These comments were primarily focused on the proposed requirements of (1) a "processor" to retain tags for an extended period following the original purchase of

legally harvested oysters; and that (2) no broken or previously used tags can be kept on the vessel. After thorough review by the Department, it was determined that no revisions to the initially proposed regulations regarding this matter were necessary.

With regard to the first proposed requirement noted above, the Enforcement Section of the Department's Division of Fish and Wildlife thoroughly reviewed this proposed regulation language in the light of the public comment received on this issue. The Department believes that no storage problem(s) should occur as a result of a "processor" now being required to keep the tags from any bags of oysters that he or she had opened. If, however, a "processor" should develop a storage problem, the tags would be picked up by Enforcement upon request, or at regular intervals, in order to avoid a storage problem. The Department discussed this rationale with members of the regulated community that had expressed their concerns on this issue at the time of the public hearing, and this arrangement was agreeable to both the "processors" and the Department's Enforcement Section. Again, no revision to the proposed regulation language is necessary, as the proposed amendments to 7 DE Admin. Code 3771 specifically allow for this arrangement to be made between the "processor" and the Department's Enforcement Section.

The second proposed regulatory requirement (i.e., no broken or previously used tags may be kept on the vessel) is the Department's attempt to eliminate one of the major "loopholes" in Delaware's current oyster regulations. At the present time, as long as used tags were permitted to remain onboard the oyster vessel, an oysterman could claim that the used tags were just removed from the oyster bags that were still onboard the vessel. Thus, by making it illegal to possess these invalid tags, oystermen would no longer be

able to continue that practice. Concern was expressed at the public hearing that, on occasion, tags were either inadvertently broken or become otherwise unusable. Once again, the Department reviewed this proposed amendment in light of the public comment received in this matter, and determined that no revision to the proposed regulation language is necessary.

Although neither the Fisheries Section nor the Enforcement Section of the Department has any knowledge of any such problems in the past with the oyster tags being used, the Department does acknowledge that the possibility exists of a seal becoming unusable as a result of insufficient quality control during its manufacture. In the event of such a problem, the Department's Fisheries Section shall work with the Enforcement Section and any other oysterman that has a valid complaint of a faulty or unusable tag. If necessary, the tag will be replaced with a new tag in order for the oysterman to harvest his full allocation.

The Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated June 24, 2010 (Report). The Report recommends certain findings and the adoption of the proposed Amendments as attached to the Report as Appendix A.

### **Findings and Discussion**

I find that the proposed Amendments are well-supported by the record developed by the Department, and I adopt the Report to the extent it is consistent with this Order. The Department's experts developed the record and drafted the proposed Amendments. Throughout the regulatory development process regarding this promulgation, the

Department received public comment, as noted in the Report, and the same were fully addressed by Department staff in a thorough and balanced manner, accurately reflecting the information as contained in the public hearing record which was developed in this matter.

I find that the Department's experts in the Division of Fish and Wildlife fully developed the record to support adoption of these Amendments. With the adoption of this Order, Delaware will (1) require that oyster tags remain in place on oyster containers while being transported for processing; (2) require that tags on oyster containers remain in place until the containers are opened or emptied by a processor; (3) require processors to retain removed tags for a period of 90 days beyond the end of the calendar year; (4) make it unlawful to process oysters aboard a vessel; (5) define "processing" as it pertains to shellfish and shellfish products; (6) define "processor" as it pertains to shellfish and shellfish products; and (7) make it unlawful to possess a used or broken oyster tag on the harvesting vessel.

In conclusion, the following findings and conclusions are entered:

- 1.) The Department has jurisdiction under its statutory authority to issue an Order adopting these proposed Amendments as final;
- 2.) The Department provided adequate public notice of the proposed Amendments, and provided the public with an adequate opportunity to comment on the proposed Amendments;

3.) The Department held a public hearing on April 29, 2010 in order to consider public comment before making any final decision;

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

5.) The recommended Amendments should be adopted as final regulation Amendments because Delaware will be able to (1) eliminate one of the major loopholes in Delaware's existing oyster regulations by making it illegal for oystermen to possess either broken or previously used oyster bag tags on the oyster vessel; (2) formally define "processing" and "processor" as it pertains to both shellfish and shellfish products, in order to provide clarification to existing regulations to promote a greater understanding of the same to oystermen; (3) more effectively and efficiently prevent the overharvesting of this natural resource by assisting the Department with its critical tasks of quota allocation, subsequent monitoring and enforcement efforts; and lastly, because (4) the amendments are well supported by documents in the record;

6.) The Department shall submit this Order approving the final regulation 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.

\_\_\_\_\_/s/Collin P. O'Mara\_\_\_\_\_  
Collin P. O'Mara  
Secretary

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## HEARING OFFICER'S REPORT

**TO:** The Honorable Collin P. O'Mara  
Cabinet Secretary, Department of Natural Resources and Environmental Control

**FROM:** Lisa A. Vest  
Public Hearing Officer, Office of the Secretary  
Department of Natural Resources and Environmental Control

**RE:** **Proposed Regulation Amendments to 7 DE Admin. Code 3702 & 3771,**  
*Delaware Shellfish Regulations Pertaining to Oysters:*  
**Definitions and Oyster Harvesting Licensee Requirements**

**DATE:** June 24, 2010

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### **I. BACKGROUND AND PROCEDURAL HISTORY:**

A public hearing was held on Thursday, April 29, 2010, at 7:00 p.m. at the Department of Natural Resources and Environmental Control ("DNREC", "Department"), 89 Kings Highway, Dover, Delaware to receive comment on proposed amendments ("amendments") to 7 DE Admin. Code 3702 and 3771, *Delaware Shellfish Regulations Pertaining to Oysters: Definitions and Oyster Harvesting Licensee Requirements*. The Department is proposing amendments to Delaware's current oyster regulations to (1) require that oyster tags remain in place on oyster containers while being transported for processing; (2) require that tags on oyster containers remain in place until the containers are opened or emptied by a processor (processors must retain removed tags for a period of 90 days beyond the end of the calendar year); (3) make it unlawful to process oysters aboard a vessel; (4) define "processing" as it pertains to shellfish and shellfish products; (5) define "processor" as it pertains to shellfish and shellfish products; and (6) make it unlawful to possess a used or broken oyster tag on the harvesting vessel.

The Department has the statutory basis and legal authority to act with regard to the proposed amendments to 7 DE Admin. Code 3702 and 3771, *Delaware Shellfish Regulations Pertaining to Oysters: Definitions and Oyster Harvesting Licensee Requirements*, pursuant to 7 Del. C. §1902.

Comment was received by the Department regarding this proposed promulgation, and the same will be discussed in detail below. Proper notice of the hearing was provided as required by law.

## **II. SUMMARY OF THE PUBLIC HEARING RECORD:**

The public hearing record consists of the following documents: (1) a verbatim transcript; (2) five documents introduced at the public hearing held on April 29, 2010, and marked by this Hearing Officer accordingly as Department Exhibits 1-5; (3) additional public comment received subsequent to the public hearing but prior to the close of the hearing record on April 30, 2010, and marked by this Hearing Officer accordingly as Department Exhibit 6; (4) a written statement received from Senior Corporal Drew Aydelotte of the Department's Division of Fish and Wildlife Enforcement Section at the time of this public hearing, and marked by this Hearing Officer accordingly as Department Enforcement Exhibit 1; and (5) the Department's technical response document forwarded via email to this Hearing Officer by Craig Shirey, Fisheries Administrator of the Department's Division of Fish and Wildlife, on June 1, 2010. The Department's person primarily responsible for the drafting and overall promulgation of these proposed amendments, Craig Shirey, developed the record with the relevant documents in the Department's files.

Following the submission of the Department's exhibits into the record at the hearing held on April 29, 2010, a brief summary as to each of the Department's proposed actions in this matter was offered by Department personnel, in order to provide a greater understanding of the same by those members of the public in attendance that evening.

The Department explained that Delaware's oyster harvesting regulations need to be updated to clarify when oyster bags and cages are to be tagged. Additionally, a time frame for the retention of tags is being proposed so that Enforcement may document the amount of oysters harvested and processed. It is also being proposed to make it illegal to have any used or invalid oyster tags onboard a vessel, because some harvesters have been reusing tags to harvest more than their quota of oysters. Onboard processing is being prohibited in order to ensure that tags remain on bags and cages until the oysters are unloaded at the dock. Lastly, the terms "processor" and "processing" have been defined to establish when the oyster tags may be removed, and to determine the party responsible for retaining the tags for the 90 days post-calendar year.

To further elaborate the issues that Department Enforcement personnel has been experiencing over the past few years with regard to Delaware's current oyster regulations, Senior Corporal Drew Aydelotte offered the Department's Division of Fish and Wildlife Enforcement Section's three primary areas of concern in this matter: (1) the identity and validity of the oyster harvest tags; (2) retention of the oyster harvesting tags on the bags beyond returning to port; and (3) retention of used oyster tags by processors for inspection.

With regard to the first concern noted above, the Enforcement Section explained that the current oyster regulations fail to properly identify and describe the oyster harvest

tags and establish their validity. This concern has been addressed in Section 2.0 of the proposed amendments by establishing the tags as “current” and “departmental”. Pertaining to the second area of concern noted above, the current oyster regulations fail to address the ownership of the oysters after they returned to port. This has been addressed in Section 2.0 of the amendments as well, by proposing that the tags shall “remain in place while being transported for processing”. Lastly, as to the third concern noted above, the current oyster regulations fail to hold those recipients of oysters (i.e., buyers, transporters, etc.) responsible for legal, as well as illegal, catches. This concern has been addressed by the proposed language contained in Section 6.0, which requires that the oyster tags on the bags be retained until processed, and that the used tags must be retained for a period of 90 days beyond the end of the calendar year.

Senior Corporal Aydelotte further noted that the additions of Sections 5.0 and 6.0 were made to strengthen the proposed regulatory changes and alleviate confusion by disallowing any processing (which has now been defined by the proposed amendments) and any results of processing (i.e., possession of used tags) while on board a vessel, even by those who would be considered a processor by definition. The Enforcement Section fully supports the proposed amendments to Delaware’s oyster regulations, and believes that the aforementioned conflicting issues experienced by Department enforcement agents in the field would be alleviated with the promulgation of these proposed amendments.

Following the Department’s presentation regarding these proposed amendments, questions and comments were received from the general public who were in attendance at the public hearing held on April 29, 2010. In each case, the Department took great care

to fully respond to the questions raised by the public, providing clarity to the purpose of the amendments at issue and answering questions to further the understanding of those in attendance that evening.

The public comments, both those received at the time of and subsequent to the hearing (while the hearing record remained open for public comment in this matter) were primarily focused on the proposed requirements of (1) a “processor” to retain tags for an extended period following the original purchase; and that (2) no broken or previously used tags can be kept on the vessel. After thorough review by the Department, it was determined that no revisions to the initially proposed regulations regarding this matter were necessary.

With regard to the first proposed requirement noted above, the Enforcement Section of the Department’s Division of Fish and Wildlife thoroughly reviewed this proposed regulation language in the light of the public comment received on this issue. The Department believes that no storage problem(s) should occur as a result of a “processor” now being required to keep the tags from any bags of oysters that he or she had opened. If, however, a “processor” should develop a storage problem, the tags would be picked up by Enforcement upon request, or at regular intervals, in order to avoid a storage problem. The Department discussed this rationale with members of the regulated community that had expressed their concerns on this issue at the time of the public hearing, and this arrangement was agreeable to both the “processors” and to the Department’s Enforcement Section. Again, no revision to the proposed regulation language is necessary, as the proposed amendments to 7 DE Admin. Code 3771

specifically allow for this arrangement to be made between the “processor” and the Department’s Enforcement Section.

The second proposed regulatory requirement (i.e., no broken or previously used tags may be kept on the vessel) is the Department’s attempt to eliminate one of the major “loopholes” in Delaware’s current oyster regulations. At the present time, as long as used tags were permitted to remain onboard the oyster vessel, an oysterman could claim that the used tags were just removed from the oyster bags that were still on the ship. Thus, by making it illegal to possess these invalid tags, oystermen would no longer be able to continue that practice. Concern was expressed at the public hearing that, on occasion, tags were either inadvertently broken or become otherwise unusable. Once again, the Department reviewed this proposed amendment in light of the public comment received in this matter, and determined that no revision to the proposed regulation language is necessary.

Although neither the Fisheries Section nor the Enforcement Section of the Department has any knowledge of any such problems in the past with the oyster tags being used, the Department does acknowledge that the possibility exists of a tag becoming unusable as a result of insufficient quality control during its manufacture. In the event of such a problem, the Department’s Fisheries Section shall work with the Enforcement Section and any other oysterman that has a valid complaint of a faulty or unusable tag. If necessary, the tag will be replaced with a new tag in order for the oysterman to harvest his full allocation.

It should be noted that all proper notification and noticing requirements concerning this proposed promulgation were met by the Department.

### **III. RECOMMENDED FINDINGS AND CONCLUSIONS:**

Based on the record developed, I find and conclude that the Department has provided appropriate reasoning regarding the need for the proposed amendments to 7 DE Admin. Code 3702 and 3771, *Delaware Shellfish Regulations Pertaining to Oysters: Definitions and Oyster Harvesting Licensee Requirements*. Accordingly, I recommend promulgation of these proposed amendments in the customary manner provided by law.

Further, I recommend the Secretary adopt the following findings and conclusions:

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 all proceedings in a manner required by the law and regulations;
4. The Department held its 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 regulatory amendments to 7 DE Admin. Code 3702 and 3771, *Delaware Shellfish Regulations Pertaining to Oysters: Definitions and Oyster Harvesting Licensee Requirements*, will (1) require that oyster tags remain in place on oyster containers while being transported for processing; (2) require that tags on oyster containers remain in place until the containers are opened or emptied by a processor; (3) require processors to retain removed tags for a period of 90 days beyond the end of the calendar

year; (4) make it unlawful to process oysters aboard a vessel; (5) define “processing” as it pertains to shellfish and shellfish products; (6) define “processor” as it pertains to shellfish and shellfish products; and (7) make it unlawful to possess a used or broken oyster tag on the harvesting vessel;

7. The Department has reviewed these proposed regulatory amendments 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, as these regulations apply fairly and equally to the entire oyster harvesting industry in Delaware, and do not adversely prejudice any Delaware citizen unfairly;
8. The Department’s aforementioned proposed regulatory amendments concerning *Delaware Shellfish Regulations Pertaining to Oysters: Definitions and Oyster Harvesting Licensee Requirements*, as published in the April 1, 2010 *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 should be 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
9. The Department shall submit the proposed regulation 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 regulations require, and as the Department determines is appropriate .

/s/ Lisa A. Vest  
LISA A. VEST  
Public Hearing Officer

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