



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL

OFFICE OF THE
SECRETARY

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Secretary's Order No.: 2013-WS-0050

RE: Approving Final Regulations to Amend 7 DE Admin. Code 7400, to wit: Amend *Shellfish Sanitation Regulations, Appendix 1*, and delete *Shellfish Sanitation Regulations, Appendix 3-2*

Date of Issuance: November 13, 2013

Effective Date of the Amendment: December 11, 2013

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 7400, to wit: to amend Delaware's *Shellfish Sanitation Regulations, Appendix 1*, and to delete *Shellfish Sanitation Regulations, Appendix 3-2*. The Department's Division of Watershed Stewardship, Watershed Assessment and Management Section, commenced the regulatory development process with Start Action Notice 2013-07. The Department published its initial proposed regulation amendments in the July 1, 2013 *Delaware Register of Regulations*. The Department then held a public hearing on July 23, 2013.

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The purpose of the Department's proposed promulgation is to ensure that public health and safety is not at risk from consumption of shellfish that may have been subject to pollution or other conditions that may render the shellfish dangerous to public health. To that end, the Department's Division of Watershed Stewardship, Watershed Assessment and Management Section, seeks to amend existing Delaware regulations to formally reclassify the northwestern portion of Love Creek, a tributary of Rehoboth Bay, from "Conditionally Approved" to "Prohibited" with regard to the harvest of shellfish.

This promulgation is in support of Secretary's Order No. 2013-WS-0017, which ordered the above referenced northwestern portion of Love Creek immediately reclassified as "Prohibited" effective May 15, 2013. This promulgation will amend existing Delaware regulations to come into alignment with the aforementioned Secretary's Order.

The proposed amendments were thoroughly vetted by the Department at the public hearing on July 23, 2013. No member of the public attended said hearing. Pursuant to Delaware law, the record remained open for fifteen (15) additional days subsequent to the date of the public hearing, for the purpose of receiving additional public comment. No public comment was received by the Department from the public at any time during the course of this proposed promulgation. It should also be noted that all proper notification and noticing requirements concerning this proposed promulgation were met by the Department. Proper notice of the hearing was provided as required by law.

The Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated October 31, 2013 (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. As previously noted, no members of the public attended the hearing held on July 23, 2013, and no public comment was received by the Department from the public at any time during the course of this proposed promulgation.

I find that the Department's experts in the Division of Division of Watershed Stewardship, Watershed Assessment and Management Section, fully developed the record to support adoption of these amendments. The adoption of this Order will ensure that public health and safety is not at risk from consumption of shellfish that may have been subjected to pollution, or other conditions that may render the shellfish dangerous to public health.

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 both the initial proposed amendments, as well as the proposed amendments, including at the public hearing held on July 23, 2013;

3.) The Department held a public hearing on July 23, 2013 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 adoption of this Order will allow Delaware to ensure that public health and safety is not at risk from consumption of shellfish that may have been subjected to pollution, or other conditions that may render the shellfish dangerous to public health;

6.) The recommended amendments should be adopted as final regulation amendments because Delaware will be able to (1) ensure that the shellfish harvested for any purpose from Delaware waters, and the shellfish that are shipped to Delaware from beyond its borders, are fit for human consumption; (2) remain in compliance and adhere to ISSC principles and standards, as administered under the auspices of the U.S. Food and Drug Administration; and lastly, because (3) the amendments are well supported by documents in the record;

7.) 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.



Collin P. O'Mara
Secretary

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 Regulations Amendments to 7 DE Admin. Code 7400, to wit: Amend *Shellfish Sanitation Regulations, Appendix 1*, and delete *Shellfish Sanitation Regulations, Appendix 3-2***

DATE: October 31, 2013

I. BACKGROUND AND PROCEDURAL HISTORY:

A public hearing was held on Tuesday, July 23, 2013, at 6:00 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 7400, to wit: to amend Delaware's *Shellfish Sanitation Regulations, Appendix 1*, and to delete *Shellfish Sanitation Regulations, Appendix 3-2*. The purpose of the Department's proposed promulgation is to ensure that public health and safety is not at risk from consumption of shellfish that may have been subject to pollution or other conditions that may render the shellfish dangerous to public health. To that end, the Department's Division of Watershed Stewardship, Watershed Assessment and Management Section, seeks to amend existing Delaware regulations to formally reclassify the northwestern portion of Love Creek, a tributary of Rehoboth Bay, from "Conditionally Approved" to "Prohibited" with regard to the harvest of shellfish.

This promulgation is in support of the recent Secretary's Order No. 2013-WS-0017, which ordered the above referenced northwestern portion of Love Creek immediately reclassified as "Prohibited" effective May 15, 2013. This promulgation will amend existing Delaware regulations to come into alignment with the aforementioned Secretary's Order.

The Department's Division of Watershed Stewardship has determined through the monitoring of water quality, analysis of shellfish growing area water data, and the review of sanitary shoreline information, that the areas to be closed include those Inland Bay waters of Love Creek in Rehoboth Bay, located in Sussex County, Delaware, lying Northwest of a line running from the points: 38° 41' 21.14"N, -75° 8' 2.74"W and 38° 40' 59.85"N, -75° 8' 22.33"W, again, due to degraded water quality. The description of said lands are as follows: *closure of the portion of Love Creek lying in a northwesterly direction from the line formed by a point marked on shore at the southern confluence of Love Creek, and Arnell Creek, thence in a southwesterly direction to a point in the marsh identified as being directly south of Boathouse Lane.* The likely affected public include commercial and recreational shellfish harvesters, shellfish dealer/processors, and any person(s) in a shellfish related business.

The Department has the statutory basis and legal authority to act with regard to the proposed amendments to 7 DE Admin. Code 7400, pursuant to Title 7 of the Delaware Code Annotated, and 7 DE Admin. Code 7402, Sections 3.1.5 of the *Shellfish Sanitation Regulations*, which charges the Department to ensure that public health and safety is not at risk from consumption of shellfish that may have been subjected to pollution, or other conditions that may render the shellfish dangerous to public health.

No member of the public attended the hearing held by the Department in this matter on July 23, 2013, nor was any public comment received by the Department at any time during this proposed promulgation. 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; and (2) four documents introduced at the public hearing held on July 23, 2013, and marked by this Hearing Officer accordingly as Department Exhibits A-D. The Department's person primarily responsible for the drafting and overall promulgation of these proposed amendments, Debbie Rouse, 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 aforementioned public hearing, Ms. Rouse proceeded to offer a brief summary as to the Department's proposed actions in this matter.

The international standards for the growing, harvesting, handling, and processing of shellfish are maintained by the Interstate Shellfish Sanitation Conference ("ISSC"). This administrative body of the National Shellfish Sanitation Program ("NSSP") is a combination of industry, state regulators, and federal Food and Drug officials. Delaware is a cooperative member of the NSSP, which evolved from the public health principles and program controls formulated at the original conference on shellfish sanitation called by the Surgeon General of the United States Public Health Service in 1925. Adherence to ISSC principles and standards is administered under the auspices of the U.S. Food and Drug Administration.

The Department's intention to reclassify the aforementioned areas of Love Creek to "Prohibited" are based upon the sanitary surveys of this affected shoreline area, which began in the fall of 2012 and continued through April 2013. These surveys included the monitoring of

water quality, the analysis of shellfish growing area data, and the review of the shoreline information, all of which confirmed the degraded biological bacteriological water quality. While the precise cause of the deterioration of this area's water quality is yet undetermined, Ms. Rouse noted that a probable cause is a combination of marginal septic systems, runoff from agricultural lands, and land under development.

As previously noted, no members of the public attended the hearing held on July 23, 2013. Pursuant to Delaware law, the record remained open for fifteen (15) additional days subsequent to the date of the public hearing, for the purpose of receiving additional public comment. The public hearing record remained open at that time for public comment through August 7, 2013. No public comment was received by the Department from the public at any time during the course of this proposed promulgation. It should also 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 actions to 7 DE Admin. Code 7400, to wit: to amend Delaware's *Shellfish Sanitation Regulations, Appendix 1*, and to delete *Shellfish Sanitation Regulations, Appendix 3-2*, as noted above. 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. Promulgation of the proposed regulatory amendments to 7 DE Admin. Code 7400, to wit: to amend Delaware's *Shellfish Sanitation Regulations, Appendix 1*, and to delete *Shellfish Sanitation Regulations, Appendix 3-2*, will ensure that public health and safety is not at risk from consumption of shellfish that may have been subjected to pollution, or other conditions that may render the shellfish dangerous to public health;
6. The recommended amendments should be adopted as final regulation amendments because Delaware will be able to (1) ensure that the shellfish harvested for any purpose from Delaware waters, and the shellfish that are shipped to Delaware from beyond its borders, are fit for human consumption; (2) remain in compliance and adhere to ISSC principles and standards, as administered under the auspices of the U.S. Food and Drug Administration; and lastly, because (3) the amendments are well supported by documents in the record;
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;
8. The Department's aforementioned proposed regulatory amendments, as published in the July 1, 2013 *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.



LISA A. VEST
Public Hearing Officer

APPENDIX “A”

START ACTION NOTICE – SHELLFISH SANITATION REGULATIONS

ATTACHMENT:

State of Delaware Shellfish Sanitation Regulations

APPENDIX 1 – list of Prohibited shellfish growing areas – Current:

Existing: *APPENDIX 1* – Rehoboth Bay & Indian River Bay (8-16).

Appendix 1-Proposed:

Proposed: *APPENDIX 1- Add 17.* Love Creek – The portion of Love Creek lying in a northwesterly direction from the line formed by a point marked on shore at the southern confluence of Love Creek and Arnell Creek, thence in a southwesterly direction to a point in the marsh identified as being directly south of Boathouse Lane. This area is marked by signs.

APPENDIX 3– list of Seasonally Approved shellfish growing areas – Current:

Existing: *APPENDIX 3- 2* - Love Creek north of a line running from a point on the southwest bank in a northeasterly direction to a point on the northeast shoreline. This area is marked by signs.

Appendix 3-Proposed:

Proposed: *APPENDIX 3 - Delete 2.* Love Creek north of a line running from a point on the southwest bank in a northeasterly direction to a point on the northeast shoreline. This area is marked by signs.

by signs.

12. Indian River-proper and its tributaries and an area adjacent to Indian River-proper bounded by a line 650 feet in length in a north-south direction beginning at the eastern bank of the mouth of Emily Gut thence running from the southern terminus of said line in a westerly direction to Highgrass Point. Vines Creek and Pepper Creek-proper and their tributaries beginning at a point south of Rock Point and running in an easterly direction to Grays Point.

13. Herring Creek and its tributaries extending northwest from a line running from Burton Point in a southerly direction to Long Neck. This area is marked by signs.

14. The southwest corner of Beach Cove. This area is marked by signs.

15. The southeast corner of Beach Cove. This area is marked by signs.

16. The northeast corner of Beach Cove. This area is marked by signs.

17. Love Creek – The portion of Love Creek lying in a northwesterly direction from the line formed by a point marked on shore at the southern confluence of Love Creek and Arnell Creek, thence in a southwesterly direction to a point in the marsh identified as being directly south of Boathouse Lane. This area is marked by signs.

Little Assawoman Bay:

1718. Assawoman Canal. The Canal-proper is not marked. However, the adjacent waters in White Creek in Indian River Bay and Little Assawoman Bay are marked by signs.

1719. Miller Creek and its tributaries and the northern reaches of Little Assawoman Bay north of a line running in an east-west direction from Goose Point on the southern bank of Miller Creek at its mouth to an unnamed point on Fenwick Island State Park. This area is marked by signs.

1720. Dirickson Creek west of a line running from Bennett Point in a southwesterly direction to Conch Point. This area is marked by signs.

1721. Tubbs Cove south of a line running in an east-west direction from the shoreline north of Treasure Beach Campground to Point Of Ridge. This area is marked by signs.

1722. The waters adjacent to the Town of Fenwick Island south of a line running from Old Inlet Point in a north-north-easterly direction to an unnamed point on the barrier. This area is marked by signs.

Assawoman Bay:

2223. That portion of an unnamed bay north of the Delaware / Maryland line adjacent to the Cape Windsor Development. This area is marked by signs.

2324. Roy Creek and its tributaries north-west of a line running from an unnamed point on Greys Neck north-east across several unnamed islands to a point south of Route 54. This area is marked by signs.

Nanticoke River:

2425. Nanticoke River and all its tributaries. This area is marked by signs.

Atlantic Ocean:

2526. The Atlantic Ocean adjacent to Indian River Inlet encompassed within a line beginning one-half mile south of the Inlet running east into the Atlantic Ocean for one-half mile, thence in a northerly direction for one mile, thence in a westerly direction for one-half mile to the beach.

This area is identified by the use of signs on the shoreline, and latitudes and longitudes recorded in the *Delaware Fishing Guide*, and/or other maps available to the public.

2627. The Atlantic Ocean within a radius of one-half mile from the South Coastal Sewage Treatment Plant outfall which is located at north latitude 38°31'34" west longitude 75°01'56".

Applies To All Areas:

APPENDIX 1

This list of *Prohibited* shellfish growing areas is recorded at the Delaware Department of Natural Resources and Environmental Control on December 20, 1995. Shellfish harvesting is prohibited in the following areas for any reason at any time:

Delaware River / Bay:

1. The Delaware River north of a line drawn in an east-west direction running concurrently with the New Castle County / Kent County Line from the Western Shore of the Delaware River on the Delaware side of the River east to the New Jersey State Line.
2. Duck Creek, Leipsic River and Simons River and all their tributaries and a contiguous area in the Delaware Bay adjacent to the mouths of these Rivers. This area is identified by the use of signs on the shoreline, and latitudes and longitudes recorded in the *Delaware Fishing Guide*, and/or other maps available to the public.
3. Little Creek and its tributaries and a contiguous area in the Delaware Bay adjacent to the mouth. This area is identified by the use of signs on the shoreline, and latitudes and longitudes recorded in the *Delaware Fishing Guide*, and/or other maps available to the public.
4. St. Jones River and Murderkill River, including their tributaries and a contiguous area in the Delaware Bay adjacent to the mouths of these Rivers. This area is identified by the use of signs on the shoreline, and latitudes and longitudes recorded in the *Delaware Fishing Guide*, and/or other maps available to the public.
5. Mispillion River, Cedar Creek and Slaughter Creek, including their tributaries and a contiguous area in the Delaware Bay adjacent to the mouths of these Rivers. This area is identified by the use of signs on the shoreline, and latitudes and longitudes recorded in the *Delaware Fishing Guide*, and/or other maps available to the public.
6. Broadkill River including its tributaries. This area is marked by signs.
7. An area of Breakwater Harbor and Delaware Bay encompassed within a line running from the northern boundary of Beachplumb Island state-owned lands, in a northeasterly direction for 5000 feet, thence in a southeasterly direction to the west end of the inshore breakwater off of Lewes Beach and running on the inside of this breakwater to a point intersecting a line drawn from the Cape Henlopen Fishing Pier to the breakwater then running along said line to the fishing pier and down the center line of the fishing pier to the beach. This area is identified by the use of signs on the shoreline, and latitudes and longitudes recorded in the *Delaware Fishing Guide*, and/or other maps available to the public.

Rehoboth Bay and Indian River Bay:

8. Lewes-Rehoboth Canal. This area is marked by signs.
9. Rehoboth Bay north of a line drawn in a northeasterly direction between the tip of White Oak Point to the tip of Bald Eagle Point, thence in a southeasterly direction to a point identified as being directly west of the south submarine observation tower at Delaware Seashore State Park and south of the Lewes and Rehoboth Canal mouth, thence in a northeasterly direction to the tip of Thompson Island, thence in an easterly direction to the southern most point of the Rehoboth Bay Marina. This area is marked by signs and buoys.
10. Indian River Inlet and Cedar Islands. The western boundary line begins at Burton's Island, running south to a point west of the marsh which lies south of an unnamed gut south of the South Inlet Marina, thence in an easterly direction to said marsh. The eastern boundary begins one-half mile south of the Inlet running east into the Atlantic Ocean for one-half mile, thence in a northerly direction for one mile, thence in a westerly direction for one-half mile to the beach. The northern boundary (in the vicinity of Cedar Islands in Rehoboth Bay) begins at an unnamed island north of Savages Ditch running in a southeasterly direction to Burton Island. The area is marked by signs and buoys.
11. White Creek and its tributaries extending south of a line drawn in an east-west direction from the East Shore of White Creek to a point on Big Marsh on the West Shore. This area is marked

2728. All artificial lagoons. Most of these areas are unmarked

2829. All wet slip basins. Most of these areas are unmarked.

APPENDIX 3

This list of **Seasonally Approved** shellfish growing areas is recorded at the Delaware Department of Natural Resources and Environmental Control into the public record on December 20, 1995. Shellfish harvesting is allowed in the following areas in accordance with Delaware's fish and game laws from December 1 through April 15:

Rehoboth Bay:

1. The areas north of a line drawn from the tip of White Oak Point in a southeasterly direction to a point identified as being directly west of the south submarine observation tower at Delaware Seashore State Park and south of the Lewes and Rehoboth Canal mouth, thence in an easterly direction to the south submarine observation tower. This area is marked by signs and buoys.

~~2. Love Creek north of a line running from a point on the southwest bank in a northeasterly direction to a point on the northeast shoreline. This area is marked by signs.~~

32. The area adjacent to West Bay Trailer Park Marina from a point north of the Marina in a southeasterly direction to a point directly north of the eastern-most point of Sally Cove Marsh and directly east of the middle Marina lagoon, thence in a southwesterly direction to a point south of the Marina. This area is marked by signs and buoys.

43. The area adjacent to the mouth of Herring Creek west of a line running from Burton Point on Angola Neck in a southeasterly direction to Nats Cove Point. This area is marked by signs and buoys.

54. Massey's Ditch and Roman T. Pond south of a line running from Bluff Point in a southeasterly direction to an unnamed point on the north bank of the unnamed island east of Massey's Ditch. This area is marked by signs.

Indian River Bay:

65. The area landward of a line running from a point on the south bank of the unnamed island east of Massey's Ditch in a southerly direction to Middle Island, thence in a westerly direction to a point on the Townsend Property east of Emily Gut (the same point marking the beginning of the Prohibited area boundary line). This area is marked by signs and buoys.

76. The area south of an east-west line running from Pasture Point, to Walter Point. This area is marked by signs and buoys.

NOTE: Please consult Delaware Fish and Game Laws for size and creel limits prior to harvesting shellfish.

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