

HEARING OFFICER'S REPORT

TO: The Honorable Shawn M. Garvin
Cabinet Secretary, Dept. of Natural Resources and Environmental Control

FROM: Theresa Smith, Regulatory Specialist, Office of the Secretary,
Dept. of Natural Resources and Environmental Control

RE: Proposed Regulation Amendments to 7 DE Admin. Code 3801 - *Shellfish Aquaculture*

DATE: February 14, 2024

I. BACKGROUND AND PROCEDURAL HISTORY:

A public hearing was held on Wednesday, September 27, 2023, at 6:00 p.m. via the State of Delaware's Zoom Video Communication Platform by the Department of Natural Resources and Environmental Control ("DNREC," "Department"), to receive comment on proposed regulatory amendments ("Amendments") to 7 DE Admin. Code 3801 - *Shellfish Aquaculture* ("Regulation"). The Department is proposing revisions to update the Regulation to incorporate current aquaculture practices, simplify compliance with the regulation for Inland Bays shellfish growers, and increase the efficiency of DNREC's administrative oversight of shellfish aquaculture leasing.

The Department has the authority, under 7 *Del. C.* Chapter 20, to lease subaqueous land to allow shellfish aquaculture to develop in Delaware's Inland Bays. The Shellfish Aquaculture Development Area ("SADA") includes leasing in Indian River, Rehoboth, and Little Assawoman Bays. The Department promulgated the Regulations in 2014, and by 2017 began the leasing of subaqueous land for shellfish aquaculture to develop. After two years of the implementation of the Regulation, the Department conducted outreach in 2019 for feedback from the public regarding shellfish aquaculture leasing.

Based on the outreach carried out, the Department is proposing Amendments to definitions, lease issuance, application procedures, aquaculture gear, lease area marking requirements, shellfish aquaculture species, shellfish cultivation, planting and harvesting requirements and timelines, reporting requirements, lease transfer, and prohibited activities. More specifically, the Department proposes Amendments to the following sections of the Regulation:

Definitions –

- Added new definitions for language within the proposed Amendments, revised existing definitions for clarity of the regulation and adjusted the defined SADA boundaries to reflect the new boundaries delineated in 7 Del. C. §2002.

Land Lease-

- Adjusted the prerequisites for SADA and Non-SADA leases to reflect that a signed lease remains invalid until an Army Corps permit is issued.
- Removed section 3.4 to conform shellfish leases with other permits and contracts signed by the Department.

Shellfish Nursery Permits and Nursery Structures –

- Revised language to state that an upweller, downweller, or raceway within a valid lease will not need a separate nursery permit.

Shellfish Aquaculture Gear-

- Added language so that lessees may use an abbreviated lease identifier approved by DNREC's DFW to label equipment.
- Revising language regarding bottom gear by removing the mandate for the bottom gear to hold oysters no closer than four inches from the bottom of the bay and instead mandating that the bottom gear must be designed to hold oysters at least four-inch from the bottom of the bay.

- Changed the requirement for gear marking buoys from three inches by three inches by three inches to three inches in diameter and visible at the water surface.
- Added language so that buoys marking containers may be marked with an approved abbreviated lease identification.
- Added language so that support structures identified on an approved operations plan as semi-permanent can remain on the lease for up to six months without live shellfish attached.
- Revised language to state that electric and hydraulic power should not be used to clean any submerged portion of gear rather than stating “fully or partially submerged in water.”

Importation of Shellfish for Shellfish Aquaculture –

- Added language to include that a permit is required for shellfish procured from other than a lease or permitted Inland Bays shellfish nursery, prior to import and planting.

Shellfish Aquaculture Species –

- Added a requirement to obtain written permission from the Director of DFW, regarding producing and culturing shellfish species, other than the Eastern oyster - *Crassostrea virginica*, in Rehoboth Bay, Indian River, and Indian River Bay.
- Added language to mean it is unlawful to produce or culture any shellfish other than the hard clam in Little Assawoman Bay, as specified in Delaware Code.

Lease Marking –

- Revised language to indicate that prior to the placement of any shellfish or gear on a leased acre, the acre must be surveyed and marked.
- Revised corner marking requirements to reflect 7 Del. C. §2002, which prohibits corner marking in Little Assawoman Bay with six-inch PVC poles and placards.

- Added language to specify that leases in Little Assawoman Bay shall be marked in accordance with Delaware Code.
- Added language to allow the use of abbreviated lease identifier approved by the DNREC's DFW to mark placards and corners.
- Added language to indicate that corner markers must be maintained while gear or shellfish are in a leased acre, but the leaseholder may choose to not have shellfish and gear on the acre and in that case not maintain the markings. If the leaseholder re-establishes growing shellfish on that acre, the lessee must accurately replace the corner markings and sign an affidavit.

Harvesting a Shellfish Aquaculture Subaqueous Land Lease -

- Revised language to add the use of automated systems that are designed to raise, lower, turn, or rotate cages and containers of shellfish.

Active Use of Shellfish Aquaculture Subaqueous Land Lease Sites –

- Added language to confirm that scientific leases, as in Delaware Code, Chapter 20, Section 5B, do not need to meet active use requirements.
- Revised the planting minimum requirement to be measured within the calendar year that the lease reaches 36 months.
- Revised the harvests minimum requirement to be measured within the calendar year that the lease reaches 48 months.
- Revised the planting minimum from bushels to individual oysters.
- Added language to confirm that planting activities will be credited towards the first lease recording shellfish moved into the Inland Bays and harvest will be credited to the final lease harvesting and selling shellfish outside of the Inland Bays.
- Removed the current section 16.4, as the information is already covered.
- Revised the current section 16.5, proposed as the new 16.4, to state the Department may, at its discretion, grant written exemption from the planting, harvest, or sale requirements.

Reporting Requirements for Shellfish Aquaculture Subaqueous Land Leases and Shellfish Aquaculture Nursery Structures –

- Revised to state that monthly reports are due on shellfish rather than specifically clam or oyster planting or harvest.
- Revised to state that the Department issued yearly survey will be due prior to February 1st of the following year, rather than 45 days from the date of receipt.

Shellfish Aquaculture Subaqueous Land Lease Transfers –

- Revised to state that a boundary survey on a transferred lease will not be required if the transferring party retains some portion of lease ownership.

Shellfish Aquaculture Subaqueous Land Lease Expiration, Surrender, Termination and Sale –

- Revised language to clarify that leaseholder may contest the Department's decision to terminate a lease by appealing the decision to the Environmental Appeals Board.
- Added language to implement an exception for lease transfers, as outlined in Section 19.0, into the existing language that prohibits the subleasing, renting, or selling of a shellfish aquaculture land lease.

Prohibited Activities -

- Revised language to specify hard clams, rather than using the term bivalve shellfish.
- Added language to state that is unlawful to fix, set, or erect shellfish aquaculture gear outside the boundaries of a lawful shellfish aquaculture subaqueous land lease.
- Added language to state that it is unlawful to conduct shellfish gardening activities without the written authorization from DNREC's Division of Watershed Stewardship Shellfish and Recreational Water Program.

Lastly, throughout the Regulation, the Department added language to enhance the effectiveness of the Department’s administrative oversight of shellfish aquaculture leasing, converted written numbers to numerical digits (in alignment with Delaware’s regulatory style manual), updated names of DNREC programs, and corrected grammar to improve clarity to members of the regulated community.

The Department has the statutory basis and legal authority to act regarding promulgation of the Amendments pursuant to 7 *Del. C.* § 2002, 2005(a) & 2006(d) & (e). The Department published its proposed regulation Amendments in the September 1, 2023, *Delaware Register of Regulations* and a public hearing that was held on September 27, 2023. There were thirteen (13) members of the public in attendance at the virtual public hearing. Pursuant to Delaware law, the record remained open for fifteen (15) additional days after the date of the public hearing for receipt of public comment. The hearing record formally closed with regard to public comment at the close of business on October 12, 2023, with a total of fourteen (14) written comments and two (2) verbal comments received by the Department during the phase of this proposed regulatory promulgation.

After the record closed, the Department’s Division of Fish and Wildlife staff prepared a Technical Response Memorandum (“TRM”), at the request of this Hearing Officer attached hereto as Appendix “B”.

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.

II. SUMMARY OF THE PUBLIC HEARING RECORD:

The public hearing record consists of the following documents: (1) a verbatim transcript; (2) thirteen (13) documents introduced by Department staff at the public hearing held on January 30, 2024, and marked by Hearing Officer Theresa Smith

accordingly as Department Exhibits 1-13; and (3) a TRM. The Department's person primarily responsible for the drafting and overall promulgation of these proposed Amendments, Zina Hense, Environmental Scientist III, with the Division of Fish and Wildlife, developed the record with the relevant documents in the Department's files.

The Department's TRM, attached hereto as Appendix "B," acknowledges the sixteen comments received from the public concerning the proposed Amendments, and provides a thorough and balanced response to the same, accurately reflecting the Record generated in this matter. Rather than attempting to relay each of the public comments received in this matter, this Order will highlight the Department's responses to the same, as provided for in full within the Report's Appendices, as referenced above.

For the purposes of brevity, this Report defers to Appendix "B" attached hereto, along with all other previously identified supporting documents that comprise the Record (including, but not limited to, the DNREC public hearing web page dedicated to this matter, where all comments received regarding the proposed Amendments, including the source of each comment, are posted in their entirety), for a comprehensive understanding of the public comments received by the Department in this matter, as well as the Department's formal responses to the same.

The Department received comments in support of shellfish aquaculture however, there were several concerns addressing the cost of entry into the shellfish aquaculture industry. The comments suggest reducing the entry cost by lowering the planting minimum to allow time to learn, develop markets, and build their aquaculture leases. Other comments addressed the beneficial impact oyster farming has on water quality, gear marking requirements, and suggestions to the Regulations.

The Department addressed the associated cost concerns that derive from the minimum annual planting requirement to annually plant minimum of 100,000 shellfish per acre. The commenters expressed that the cost of equipment needed, such as poles,

lines, anchors, and cages, to meet 100,000 planting minimum by the third year (36 months) of the lease will cause a barrier to enter aquaculture farming.

The Department conducted research of other states that lease subaqueous land for shellfish aquaculture. Delaware's shellfish aquaculture regulation does not lead to start up or operational costs dissimilar to what shellfish growers in other states face, nor is Delaware unique in having a significant portion of small independent owner/operator lessees. Moreover, the requirement for a minimum of 100,000 is considered a small-scale production (selling 50,000 to 250,000 market oysters per year.)

The Department finds that reducing the minimum, as suggested in the comments, will result in adverse effects rather than the commenters expected reduction in entry cost of the shellfish aquaculture industry. A reduced minimum will result in low harvest, and ultimately cost the grower more with associated cost related to time and resources to maintain the farms. Additionally, the economic impact of reducing the planting minimum could cause a sudden influx of new lessees enticed by lower planting limits, which would be a corresponding inrush of competition saturating the local market, potentially hurt Inland Bays lessees. By reducing the planting minimum, the new lessees would be planting and harvesting at a very small scale, thus make marketing very difficult. Studies also indicate that lowering the annual planting minimum on leasable subaqueous land will decrease the density of cultured shellfish on those leased acres, which is one of the major determinants to result in beneficial water quality improvements. Ultimately, reducing the annual planting minimum will not reduce the cost of a shellfish lease commensurate to the reduction in shellfish planting and is not likely make a shellfish aquaculture lease profitable.

The Department does however recognize the multiple comments stating that lessees need more time to learn, develop markets, and build their aquaculture leases. Therefore, the Department proposes *revised* Amendments to 7 DE Admin. 3801 §16.3.1 to extend the initial proposed timeframe from 36 months to 60 months from the date of lease issuance or transfer, that the leaseholders must provide evidence that they annually

plant at least 100,000 shellfish per acre leased. The proposed change to 60 months means that lessees will have until the fifth year of the lease before the minimum planting requirement is in effect. The first five years of a lease is one-third of a lease term, and the Department believes five years is an adequate amount of time to gain experience needed to be able to meet the minimum planting requirement. Additionally, to remain consistent with the timeline currently set between the planting and harvest minimums coming into effect on a lease, the Department also proposes a modification to 7 DE Admin. C. 3801 §16.3.2 to state that the harvest minimum will begin in the calendar year that the lease reaches 72 months. Given these prospective changes to §16.3.1 and §16.3.2, the Department proposes modification to clarify criteria for planting and harvest minimum exemption in 7 DE Admin. C. 3801 §16.5.

Accordingly, the Department's proposed *revised* Amendments and TRM are attached hereto as Appendix "A" and Appendix "B," respectively, for the Secretary's review.

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 *revised* regulatory amendments to 7 DE Admin. Code 7 DE Admin. Code 3801 - *Shellfish Aquaculture* and will enable the Department to incorporate current aquaculture practices, simplify compliance with the regulation for Inland Bays shellfish growers, and increase the efficiency of DNREC's administrative oversight of shellfish aquaculture leasing. Accordingly, I recommend promulgation of the same, in the customary manner provided by law.

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

1. The Department has the statutory basis and legal authority to act with regard to this proposed regulatory promulgation, pursuant to 7 *Del. C.* § 2002, 2005(a) & 2006(d) & (e);

2. The Department has jurisdiction under its statutory authority, pursuant to 7 *Del.C.* Chapter 60, to issue an Order adopting these proposed *revised* 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 September 27, 2023, and during the 15 days subsequent to the hearing (through October 12, 2023) before making any final decision;

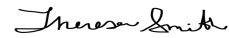
4. Promulgation of the proposed *revised* Amendments to 7 DE Admin. Code to 3801 - *Shellfish Aquaculture* will enable the Department to incorporate current aquaculture practices, simplify compliance with the regulation for Inland Bays shellfish growers, and increase the efficiency of DNREC's administrative oversight of shellfish aquaculture leasing.

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. The Department does not anticipate additional costs to the aquaculture industry however, the new requirement of the use of cultivation tags will require additional record keeping, but this is not seen as a burden, rather it will benefit the shellfish aquaculture program lessees;

6. The Department has reviewed this revised proposed regulatory promulgation in the light of 7 *Del.C.* §10003 and 29 *Del.C.* §10118(b)(3), and has determined that conducting such an assessment regarding the impact of this regulation on the achievement of the State of Delaware's greenhouse gas emissions reduction targets is not practical;

7. The Department’s proposed regulatory Amendments, as initially published in the September 1, 2023, *Delaware Register of Regulations*, and then subsequently revised, 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

8. The Department shall submit the proposed *revised* Amendments as final regulatory amendments 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.



Theresa L. Smith
Public Hearing Officer

