

HEARING OFFICER'S REPORT

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

FROM: Lisa A. Vest
Regulatory Specialist, Office of the Secretary
Department of Natural Resources and Environmental Control

RE: **Proposed Amendments to 7 DE Admin. Code 3755: *Lobsters***
(Hearing Docket No. 2023-R-F-0020)

DATE: January 23, 2024

I. BACKGROUND AND PROCEDURAL HISTORY:

A virtual public hearing was held on Thursday, December 21, 2023, at 6:00 p.m. via the State of Delaware Zoom Platform by the Department of Natural Resources and Environmental Control (“DNREC” or “Department”) to receive comment on proposed regulatory amendments to 7 DE Admin. Code 3755, *Lobsters (Homarus americanus)* (“Amendments”). The Department’s Division of Fish and Wildlife (“DFW”) is proposing to amend Delaware’s existing lobster regulation to comply with the Atlantic States Marine Fisheries Commission (“ASMFC”) Addendum XXIX to Amendment 3 to the American Lobster Fishery Management Plan (“FMP”). The ASMFC’s American Lobster FMP requires all vessels with federal lobster permits to install and maintain an electronic tracking device that will transmit location data while the vessel is in the water. The FMP is requiring the electronic trackers because the same are now required by a National Oceanic and Atmospheric Administration (“NOAA”) Fisheries federal regulation intended to reduce interactions between fishing boats and gear and the endangered North Atlantic Right Whale.

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

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

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

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

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

Pursuant to 29 *Del.C.* §10118(a), the hearing record (“Record”) remained open for fifteen (15) additional days subsequent to the date of the public hearing for receipt of public comment. The Record formally closed with regard to public comment on January 5, 2024. Only one written comment was received by the Department concerning this proposed regulatory promulgation, and the DFW’s response to the same is discussed below. It should be noted that all notification and noticing requirements concerning this matter were met by the Department. Proper notice of the hearing was provided as required by law.

II. SUMMARY OF THE PUBLIC HEARING RECORD:

The Record consists of the following documents:

- (1) A verbatim transcript of the public hearing, as provided by Veritext Legal Solutions;
- (2) Eleven (11) documents introduced by Department staff at the public hearing held on December 21, 2023, and marked by this Hearing Officer at the time of the hearing accordingly as Department Exhibits 1-11;
- (3) One public comment received in this matter, as posted on the hearing web page dedicated to this proposed regulatory promulgation; and
- (4) Technical Response Memorandum from John H. Clark, Fisheries Section Administrator, DFW, dated January 11, 2024.

The Department’s person primarily responsible for the drafting and overall promulgation of the proposed Amendments, John H. Clark, Fisheries Section Administrator for the DFW, developed the Record with the relevant documents in the Department’s files.

III. RECOMMENDED FINDINGS AND CONCLUSIONS:

Currently pending before the Department is the adoption of the aforementioned proposed amendments to 7 DE Admin. Code 3755, *Lobsters (Homarus americanus)*. As noted previously, the proposed Amendments will enable the Department to comply with the ASMFC Addendum XXIX to Amendment 3 to the American Lobster FMP, which requires all vessels with federal lobster permits to install and maintain an electronic tracking device that will transmit location data while the vessel is in the water. The FMP is requiring the electronic trackers because the trackers are now required by a NOAA Fisheries federal regulation intended to reduce interactions between fishing boats and gear and the endangered North Atlantic Right Whale.

The Record reflects that only one comment was received by the Department in this matter. That commenter questioned the need for this particular regulation, not the content of the regulation itself. At the request of this Hearing Officer, the Department's DFW provided a TRM in response to the sole comment received in this matter. In that TRM, dated January 11, 2024, the Department noted that this proposed regulatory action is being taken so that Delaware will remain in compliance with the ASMFC Addendum XXIX to Amendment 3 to the American Lobster FMP, as noted above. The TRM further notes that, while the Department appreciates the submission of this comment, the same is necessary in order for Delaware's lobster fishery to continue to operate. The Department's TRM is attached hereto as Appendix "B."

Based on the Record developed in this matter, I find and conclude that the Department has provided appropriate reasoning regarding the need for the proposed Amendments. Accordingly, I recommend promulgation of the proposed amendments to 7 DE Admin. Code 3755, *Lobsters (Homarus americanus)*, 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 the proposed amendments to 7 DE Admin. Code 3755, *Lobsters (Homarus americanus)*, pursuant to 7 *Del.C.* §1902;

2. The Department has jurisdiction under its statutory authority, pursuant to 7 *Del. C. Ch. 60*, to issue an Order adopting the proposed Amendments as final;

3. The Department provided adequate public notice of the proposed Amendments and all proceedings in a manner required by the law and regulations, and provided the public with an adequate opportunity to comment on the proposed Amendments, including at the time of the virtual public hearing held on December 21, 2023, and during the 15 days subsequent to the hearing (through January 5, 2024), in order to consider all public comment on the same before making any final decision;

4. Promulgation of the proposed Amendments will enable Delaware to remain in compliance with the ASMFC Addendum XXIX to Amendment 3 to the American Lobster FMP, thereby allowing Delaware's lobster fishery to continue to operate;

5. The Department has reviewed the proposed Amendments in the light of the Regulatory Flexibility Act, consistent with 29 *Del.C. Ch. 104*, and believes the same to be lawful, feasible, and desirable, that it will not establish substantive additional costs for individuals or small businesses, and that the recommendations as proposed should be applicable to all Delaware individuals or small businesses equally;

6. The Department's proposed Amendments, as published in the December 1, 2023, *Delaware Register of Regulations* and fully vetted to the public at the aforementioned public hearing held on December 21, 2023, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, the proposed Amendments should be approved as final Amendments, which shall go into effect ten days after publication in the next available issue of the *Delaware Register of Regulations*;

7. The Department has an adequate Record for its decision, and no further public hearing is appropriate or necessary; and

8. The Department shall submit the proposed Amendments as final Amendments to the *Delaware Register of Regulations* for publication in its next available issue and shall provide such other notice as the law and regulation require, as the Department determines is appropriate.

/s/Lisa A. Vest
LISA A. VEST
Regulatory Specialist

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Attachments:

Appendix A: Proposed Amendments (7 DE Admin. Code 3755)

Appendix B: TRM (January 11, 2024)