



STATE OF DELAWARE
**DEPARTMENT OF NATURAL RESOURCES AND
ENVIRONMENTAL CONTROL**

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SECRETARY

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Secretary's Order No: 2024-F-0014

RE: Approving Final Amendments to 7 DE Admin. Code 3801 - *Shellfish Aquaculture*

Date of Issuance: April 11, 2024

Effective Date: May 11, 2024

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") pursuant to 7 *Del.C.* §§6006 and 6010, and all other relevant statutory authority, the following findings of fact based on the record, reasons and conclusions are entered as an Order of the Secretary in the above-referenced regulatory proceeding.

Background, Procedural History and Findings of Fact

This Order relates to 7 DE Admin. Code 3801 - *Shellfish Aquaculture* ("Regulation"). The Department proposes amendments to the Regulation to incorporate current aquaculture practices, simplify compliance with the regulation for Inland Bays shellfish growers, and enhance the efficiency of DNREC's administrative oversight of shellfish aquaculture leasing.

Pursuant to 7 *Del. C.* Chapter 20, the Department promulgated the Regulation in 2014 to lease subaqueous land for the development of shellfish aquaculture in Delaware's Inland Bays. Commencing in 2017, the Department initiated the leasing of subaqueous land for shellfish aquaculture within the Shellfish Aquaculture Development Area ("SADA") that includes Indian River, Rehoboth, and Little Assawoman Bays. After two years of implementation of the Regulation, the Department's Division of Fish and Wildlife ("DFW") conducted public outreach in 2019 to gather feedback on the leasing of subaqueous land for shellfish aquaculture.

Based on the outreach, 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, within the Regulation, the Department included language to enhance the effectiveness of the Department's administrative oversight of shellfish aquaculture leasing, updated the names of DNREC programs, and corrected grammar to improve clarity to members of the regulated community. Additionally, in alignment with Delaware's regulatory style manual, written numbers were converted to numerical digits.

The Department published its initial proposed regulation Amendments in the September 1, 2023, *Delaware Register of Regulations*. Thereafter, the public hearing regarding this matter was held on September 27, 2023. There were thirteen (13) members of the public in attendance. The Department presented the proposed Amendments at its public hearing that was held on September 27, 2023.

Pursuant to 29 *Del.C.* §10118(a), the hearing record ("Record") remained open for receipt of written comment for 15 days following the public hearing. The Record formally closed for comment in this matter at close of business on October 12, 2023, with a total of sixteen (16) comments received by the Department for the formal promulgation. All notification and noticing requirements concerning this matter were met by the Department. Proper notice of the hearing was provided as required by law.

Subsequent to the close of the Record, and at the request of presiding Hearing Officer Theresa Smith, the Department's DFW staff prepared a Technical Response Memorandum ("TRM"). The Department's TRM acknowledges the comments 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. The comments expressed support for the proposed Amendments; however, concerns were raised regarding the financial barriers to entering the shellfish aquaculture industry. Specifically, concerns were voiced about the costs associated with necessary equipment such as poles, lines, anchors, and cages, which may hinder individuals from entering aquaculture farming and meeting the minimum annual planting requirement of 100,000 shellfish per acre by the third year (36 months) of the lease.

The Department recognizes 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 of 36 months. Leaseholders must provide evidence that they annually plant at least 100,000 shellfish per acre leased, extending this requirement to 60 months from the date of lease issuance or transfer date. The proposed change 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 also proposes a modification to clarify criteria for planting and harvest minimum exemption in 7 DE Admin. C. 3801 §16.5.

The Department has the statutory basis and legal authority to act with regard to the formal promulgation of these *revised* proposed Amendments, pursuant to 7 *Del. C.* § 2002, 2005(a) & 2006(d) & (e). The Department's *revised* proposed Amendments support the harvesting of shellfish aquaculture, while protecting public health, environmental preservation, and safeguarding of the State's natural resources. These revisions are not substantive in nature, and no further noticing or additional hearing is necessary in this matter. All notification and noticing requirements concerning this matter were met by the Department and proper notice of the hearing was provided as required by law.

Hearing Officer Theresa Smith prepared her report dated February 14, 2024 ("Report"), which expressly incorporated into the Record the *revised* proposed Amendment and the above-referenced TRM and TRM, attached thereto as Appendix "A" and Appendix "B," respectively. Mrs. Smith's Report set forth the procedural history, summarized and established the record of information ("Record") relied on in the Report and provided findings of fact, reasons, and conclusions that recommend the approval of the *revised* proposed Amendments pending before the Department.

Reasons and Conclusions

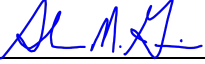
Currently pending before the Department are the *revised* proposed regulatory amendments to 7 DE Admin. Code 3801 - *Shellfish Aquaculture*. In reviewing the applicable statutes and regulations, as well as weighing the public benefits of the *revised* proposed Amendments against potential detriments, the Department's experts in the DFW have concluded that the *revised* proposed Amendments comply with all applicable federal and state laws and regulations. Further, the proposed Amendments as published in the September 1, 2023, *Delaware Register of Regulations*, subsequently revised, are reflective of the Department's authority under 7 *Del. C.* § 2002, 2005(a) & 2006(d) & (e), to improve the aquaculture industry in Delaware's Inland Bays by proposing changes to the conditions for leasing of subaqueous bottom within Delaware's Inland Bays for the culture of shellfish. The Department's TRM, attached and incorporated into Mrs. Smith's Report as Appendix "B," acknowledges the 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.

Based on the Record developed by the Department's experts in the Division of Fish and Wildlife, and established by the Hearing Officer's Report, I find that the *revised* proposed amendments to 7 DE Admin. 3801 - *Shellfish Aquaculture*, are well supported. I further find that the Department's experts fully developed the record to support adoption of these *revised* proposed Amendments. Therefore, the recommendations of the Hearing Officer are hereby adopted, and I direct that the *revised* proposed Amendments be promulgated as final.

The following reasons and conclusions are entered:

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 *revised* proposed Amendments as final;
3. The Department provided adequate public notice of the initial proposed Amendments, and subsequently the *revised* proposed Amendments, 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 *revised* proposed Amendments to 7 DE Admin. 3801 - *Shellfish Aquaculture* will enable the Department 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;
5. The Department has reviewed the *revised* proposed Amendments in 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 through the *revised* proposed Amendments,
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 subsequently revised, 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.


Shawn M. Garvin
Secretary