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ENVIRONMENTAL PROTECTION

NATURAL AND HISTORIC RESOURCES

Oysters

Proposed Readoption without Amendment, N.J.A.C. 7:25A

Authorized by Bob Martin, Commissioner

Department of Environmental Protection

Authority: N.J.S.A. 13:1D-9, 23:2B-14, 50:1-1 et seq., 50:2-7 through 50:2-12, and 50:3-1 et seq.

Calendar Reference: See summary below for an explanation of the exception to calendar requirement.

DEP Docket No.: 10-10-10

Proposal Number: _____

Submit written comments by January 14, 2011 to:

Gary J. Brower, Esq.
Office of Legal Affairs
Attn: DEP Docket No. 10-10-10
Department of Environmental Protection
401 East State Street, Floor 4
P.O. Box 402
Trenton, NJ 08625-0402

The Department of Environmental Protection (Department) requests that commenters submit comments on disk or CD as well as on paper. Submittal of a disk or CD is not a requirement. Submittals on disk or CD must not be access-restricted (locked or read-only) in order to facilitate use by the Department of the electronically submitted comments. The Department prefers Microsoft Word 6.0 or above. Macintosh formats should not be used. Each

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comment should be identified by the applicable N.J.A.C. citation with the commenter's name and affiliation following the comment.

This rule proposal can be viewed or downloaded from the Department's web site at <http://www.state/nj/us/dep/rules>.

The agency proposal follows:

Summary

As the Department has provided a 60-day comment period on this notice of proposal, this notice is excepted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)5.

Pursuant to N.J.S.A. 52:14B-5.1, the Oysters rule, N.J.A.C. 7:25A, were scheduled to expire on October 13, 2010. The Department proposes to readopt the rules without amendment. In accordance with N.J.S.A. 52:14B-5.1c, the expiration date has been extended to April 11, 2011 as a result of the filing this notice of proposal to readopt the rules with amendments with the Office of Administrative Law.

The Oysters rules, N.J.A.C. 7:25A, govern the management and harvest of oysters from the Delaware River, Delaware Bay and their tributaries. These rules have been developed in concert with the participants of the fishery involved to improve enforcement of existing regulations. These rules recently underwent a significant reorganization (adopted effective July

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6, 2010) of the existing subchapters and amendments were adopted that reflect how the fishery had been operating since the start of the direct market harvest season in 1996 (See: [41 N.J.R. 2167\(a\)](#), [42 N.J.R. 1362\(a\)](#)).

A description of the rules proposed for readoption follows.

N.J.A.C. 7:25A is currently divided into four subchapters: Subchapter 1, Oyster Management; Subchapter 2, Direct Market Harvest Season; Subchapter 3, Oyster Transplant Season; and Subchapter 4, (Reserved).

Subchapter 1, Oyster Management, includes rules governing the issuance, renewal and transfer of oyster dredge vessel licenses, the leasing of oyster ground in Section E in the Delaware Bay (a shellfish culture area generally located due west of Egg Island Point, Lawrence Township, Cumberland County), and the reporting of oysters harvested from the Delaware River, Delaware Bay and their tributaries. This subchapter additionally governs the imposition, collection, and dedication of fees to finance an oyster cultch and resource enhancement program to facilitate the protection, conservation, management and improvement of the oyster resource and industry in New Jersey.

Subchapter 2, Direct market harvest season, includes rules governing the taking of oysters from the State's natural seed beds. The subchapter regulates the direct market harvest of oysters from the State's natural seed beds in Delaware Bay. The rules for the direct market harvest season include limitations on harvest times and areas, establishment of an annual harvest

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quota, provisions for the purchase and use of harvest tags and a requirement for weekly reporting by harvesters. Subchapter 2 also incorporates the conditions attendant to season openings by which the fishery has been operating since the start of the direct market harvest season in 1996. These conditions include the following: daily notification requirements, minimum size limits for oysters taken for direct market sale and proper tagging and containerization procedures. This subchapter also includes provisions that allow direct market harvest season participants the option to plant all or part of their allocation on their leased grounds.

Subchapter 3, Oyster transplant season, provides the framework for the harvest of oysters from the State's natural seed beds for transplanting directly to the leased grounds in the lower Delaware Bay, a common practice before oyster disease conditions greatly reduced the benefits of this harvest option. This subchapter contains the rules by which the fishery operates during this harvest program. The subchapter includes the rules governing the harvest of seed oysters from the State's natural seed beds. This subchapter provides for the transplanting of seed oysters from the State's natural seed beds directly to industry leased grounds when environmental conditions make this a viable management option. Although this management option has not been employed in many years, as high disease levels have been present in the planting grounds, the subchapter maintains this harvest option for future use if disease and environmental conditions are suitable. Subchapter 3 also includes the specification of harvest times and areas, establishes an annual harvest quota, provides a mechanism for the collection of fees for oysters harvested from the State's natural seed beds, establishes a requirement for weekly reporting by harvesters and provides for other control methods, such as harvester notification and tag purchasing requirements, as may be necessary to protect the resource.

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Social Impact

The Department anticipates that the rules proposed for readoption without amendment will have a beneficial social impact on participants of the oyster industry and also the general public. The rules will maintain the Department's management program for the oyster fishery in the Delaware Bay. The current management program, which was initiated in 1996, has evolved significantly over the past 15 years. This program is designed to control harvest pressure on the State's natural oyster beds, establish procedures for licensing and replacing oyster dredge vessels, provide for the leasing of bay bottom above the southwest line in that area known as Section E and maintain a funding program for oyster resource enhancement activities.

These rules are continuously reviewed and discussed by the Delaware Bay Section of the New Jersey Shellfisheries Council (Council), a group that advises the Commissioner and is composed of individuals involved in the oyster industry. The Council considers these rules necessary for the regulation of the fishery. The continuance of these rules will permit the Department to monitor, protect and initiate management strategies to improve the long-term productivity of the oyster resource, which will continue the positive social impact of the rules and the availability of this resource for public consumption/enjoyment.

The rules will also continue the concept of allowing the oyster harvesters to sell seed oysters which are 2½ inches or larger from the seed beds during the direct market harvest season. This strategy permits the oystermen to capitalize immediately on the marketability of the oysters

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from seed harvest instead of having to initially transfer the seed to the planting grounds for grow-out. The latter practice, which was required until the rules were amended in 1996, required the reharvest of the oysters for market, adding substantially to the operating costs of the harvester. Also, because of the relative inefficiency of the oyster dredge, large quantities of oysters would have to be planted in order to ensure the recovery of adequate quantities of oysters to recoup operating expenses. Additionally, if the oysters remain on the planting ground for an extended period, significant mortality may result from disease and predation. The ability to market oysters immediately after harvest from the seed beds minimizes overhead costs to the harvester. This capability also provides for the prudent utilization and conservation of the existing resource. Continuation of this existing provision in the readopted chapter will have a positive social impact.

The proposed readoption will also continue the Oyster Cultch Program, which provides a funding source for both maintenance and enhancement of the oyster resource. In general, readopting the rules in this chapter will help the Department continue the long-term management program for the State's oyster resource. It is anticipated that the program will continue to benefit the oyster industry and the State by maximizing the long-term sustainable yield of oysters, improving the economic well-being of the industry and support communities, improving the employment environment and providing the public with a high quality oyster, safe for consumption.

The readopted rules will continue to allow the Department and Council to select prudent management strategies and general control methods. The existing rules provide flexibility to

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industry members regarding the harvest of oysters from the Delaware River, Delaware Bay and their tributaries, giving them the ability to harvest oysters for market sale or transplanting to individual leases during a permitted harvest season.

Economic Impact

The proposed readoption will maintain a systematic procedure for managing the oyster fishery in Delaware Bay in order that the fishery may continue to operate at a biologically sustainable level. Before the implementation of the original oyster management rules in 1981, the Delaware Bay oyster fishery operated under what economists call an “open access” regime, in which access to the resource is open to all comers. Under such a system, each individual participant has an economic incentive to harvest the maximum amount that he or she can in order to maximize short-term profits. The result is frequently that the resource is overharvested to the point where a breeding population adequate to combat predators and disease (a major and recurring problem for the Delaware Bay oyster resource) cannot be maintained, and the population drops to a level so low that harvesting is no longer economically worthwhile. For a general discussion of this problem and the measures commonly taken to address it, see, for example, Tom Tietenberg, *Environmental and Natural Resource Economics*, 5th ed., 2000, chapter 13 Addison-Wesley Publishing, New York.

The program maintained by the proposed readoption is designed so that the Department, in consultation with the Council and after careful consideration of the most current biological

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and physical data, can make appropriate decisions on harvest levels and strategies. Subchapter 2, Direct market harvest season, continues to facilitate the generation of an immediate cash flow for the harvester. This cash flow can be used to cover wages, equipment, debt maintenance, operating capital, and return on investment. Subchapter 3, Oyster transplant season, continues to provide for the transplanting of oysters from the State's natural seed beds directly to industry-leased grounds when environmental conditions make this a viable management option. Under such conditions, harvesters would benefit economically via improved oyster meat quality (with likely higher dockside product value) and with greater flexibility with respect to selling those oysters from their leased grounds during favorable market conditions. The proposed readoption continues to contain provisions that allow harvesters to elect either to directly market the oysters or to transplant the oysters for later sale during either a designated direct market harvest season or an oyster transplant season. In this way, individual harvesters can elect to use their available allocation for immediate economic gain by taking oysters directly to market or for potential long-term gains by transplanting the harvested oysters to their individual leased grounds.

The proposed readoption continues the landing fee program. The current program assesses a fee of \$2.00 per bushel for oysters harvested from the Delaware River, Delaware Bay and their tributaries. Continuance of this fee is proposed in order to maintain the Oyster Cultch Program. In order to maintain an economically-sound program, the landing fee must be set at a rate that can meet the expense of planting one bushel of shell material, or cultch, for every bushel of material that is removed from the State's natural seed beds from harvest activities. It currently costs approximately \$2.00 for every bushel of clean shell that is planted as part of the Department-coordinated shell planting program. The continuance of the Oyster Cultch Program

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is a critical component of the State's resource management program and the landing fee continues to be fully supported by the Council. Considering the dockside value of a bushel of oysters over the last five years, which has generally ranged from \$30 to more than \$45 per bushel ex-vessel (that is, the amount paid directly to the harvester at time of landing), the \$2.00 per bushel fee represents a nominal operating expense (approximately five percent) to the harvester. While this fee may represent a minimal negative short-term economic impact to an individual oysterman, with the actual impact depending upon the amount of the resource the oysterman takes, the oyster industry overall, and thus the individual oysterman as well, will benefit economically from the resource enhancement activities funded through the Oyster Resource Development Account. In recent years, the Council has set the payment to industry members who transplant seed from one seed bed to another at \$2.50 per bushel transplanted. The continuance of this enhancement program will ensure that the cultch planting activities will continue to protect and enhance this valuable and ecologically important resource and those businesses that depend upon it for income. Given that the annual oyster harvest has averaged approximately 77,000 bushels over the last four years, the maintenance of the landing fee at this rate would on average generate \$154,000 of revenue annually, which is a modest investment to help protect an annual harvest of \$3.2 million (at \$40 per bushel).

The proposed readoption maintains requirements that dredge vessel license holders and oyster tongers report oyster harvest. Harvest reporting requirements, including the reporting requirements for tongers, are key enforcement tools that deter illegal harvest. Illegal harvest negatively impacts both the resource available to licensed harvesters who are staying within their allotments, and the Department and Council's ability to effectively manage the resource to assure

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that is not put at risk by excessive take. The Department is proposing to continue existing penalty provisions without change. These provisions do not impose any costs on harvesters complying with the rules and have been an effective part of the Department and Council's efforts to assure the long-term sustainability of this resource. Accordingly, continuation of this portion of the management program is anticipated to have an overall positive economic impact on licensed harvesters. The existing reporting requirements provide the Department with an additional means to ensure that actual harvest does not exceed the established quotas for a given season, thereby protecting the long-term viability of the oyster resource and the economic benefits it provides.

Besides landing fees, other costs of implementing the proposed readoption are mainly those for the State. The Department maintains an office convenient to this industry, which includes four full-time staff, three to five summer staff, and enforcement staff (who spend on average one or two days a week in season). In addition, the State provides \$116,000 in funding to Rutgers University each year for oyster population assessment work, an essential step in administering the oyster management program.

In addition to the benefits cited above, the harvesting procedures required under the proposed readoption help avoid public health and private medical expenditures that could be caused by bringing to market an unsafe seafood product. This avoided cost is difficult to quantify but could be significant to individuals or businesses affected by the serving or consumption of contaminated food.

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Environmental Impact

The rules proposed for readoption are expected to have a positive environmental impact on the State's oyster resource in Delaware Bay. The rules contain a number of provisions designed to encourage prudent oyster harvest practices and to protect the State's oyster resource from over-harvest. In particular, these rules maintain reporting requirements for oysters harvested by oyster dredge vessels and oyster tongers. The collection of harvest data from all oyster harvesters as well as reporting by licensed oyster dealers who purchase these oysters provides the Department with an important crosscheck to confirm and monitor actual harvest. Without the maintenance of these provisions, unreported or underreported harvest from the seed beds could severely deplete the seed beds in a relatively short period of time.

The readopted rules will continue the Department's oyster resource management and enhancement capabilities with revenue deposited into the Oyster Resource Development Account. This account, established at N.J.S.A. 23:3-12.2, is allocated to the Division for the enhancement of the resource in Delaware Bay. The proposed readopted rule also maintains a mechanism for the maintenance and enhancement of the oyster seed beds via planting of cultch and movement of seed oysters. The latter enhancement measure is the transplanting of seed oysters from one bed to another. This provision permits the transfer of the slow-growing, underutilized stocks of the uppermost seed beds to intermediate beds in the bay. These stocks, and the industry, benefit from accelerated growth rates and improved meat quality, which

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normally occurs when oysters are transplanted to higher salinity areas. The proposed readopted rules maintain the current harvest reporting system and also the oyster landing fees. The revenue from the landings fees will continue to generate revenues that are deposited into the Oyster Resource Development Account. Management strategies that are capable of maintaining viable oyster stocks not only provide benefits to those individuals with parochial resource interest, but also have ancillary benefits to the environment and other estuarine organisms and fisheries as well. Healthy oyster beds also improve the quality of the environment by continuously filtering the water column, removing contaminants and by serving as habitat for numerous other species. These species include sponges, polychaetes, crustaceans, gastropods, echinoderms and finfish such as striped bass, croakers, porgies, sea bass, tautog, flatfish and others.

The readopted rules will maintain the regulatory framework that allows the Department to manage the direct market harvest season and the oyster transplant season, and the Department's ability to effectively manage the harvest of oysters from the State's natural seed beds to ensure compliance with annual harvest quotas. Properly managed harvest provides economic gain to harvesters while maintaining the positive ecological benefits that healthy oyster beds provide. A reduction in oyster abundance would contribute to the demise of the numerous benthic assemblages that are associated with healthy, active oyster beds and would impact the fish stocks that utilize beds for spawning, nursery or foraging habitat. Water quality would also suffer since individual oysters are capable of filtering large volumes of water while removing suspended material from the water column.

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The readopted rules will continue in place the Oyster Resource Development Account, which provides money for improving the biological potential of the oyster beds via the collection of fees for oysters harvested from the Delaware River, Delaware Bay and their tributaries, thus creating positive environmental benefits. The proposed readopted rules maintain the current landing fee to oysters harvested via hand tongs from Delaware River, Delaware Bay and their tributaries, thereby providing additional financial resources to be used for resource enhancement programs and corresponding positive environmental impacts.

Federal Standards Statement

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-4 et seq. require State agencies, that adopt, readopt or amend State regulations that exceed Federal standards or requirements to include in the rulemaking document a Federal standards analysis. The proposed readoption is not promulgated under the authority of, or in order to implement, comply with, or participate in any program established under Federal law or under a State statute that incorporates or refers to Federal law, standards, or requirements. Accordingly, Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. do not require a Federal Standards Analysis.

Jobs Impact

The proposed readoption is designed to maximize the long-term production of oysters in Delaware Bay. The rules governing the harvest of oysters from the Delaware River, Delaware Bay and their tributaries, which offer harvesters the opportunity to either transplant their harvest

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allocation or take it directly to market, allow individuals to make business decisions that are designed to maximize their economic returns. The continuation of the current landing fee that is paid by oyster harvesters is expected to help maintain employment in the fishery. The landing fees are used to fund enhancement programs that aim at increasing oyster abundance, which allows for a sustainable fishery. The proposed readoption of these rules, which encourage prudent oyster harvest practices and protect the State's resource from overharvest, will help ensure that the industry and the jobs related to the industry remain strong over the long term. As indicated in the Economic Impact analysis above, the proposed readoption maintains the reporting requirements by dredge vessel license holders and oyster tongers. The proposed readoption continues to require reporting by oyster harvesters and imposes nominal reporting requirements. It is not anticipated that oyster harvesters will need to retain assistance in preparing these reports. Accordingly, it is not anticipated that readoption of the rules will have any measurable impact on jobs. Accordingly, it is anticipated that the proposed readoption will continue in place the resource management program that assures that the resource remains viable in the long term and results in an overall positive impact on jobs.

Agriculture Industry Impact

Pursuant to N.J.S.A. 52:14B-4, the Department has evaluated this rulemaking to determine the nature and extent of the proposed readoption on the agriculture industry. Oysters are typically produced and marketed in Delaware Bay utilizing one of two methods. Under the "managed" method, oysters are harvested from natural or heavily managed stocks. Under the "cultivated" method, oysters are planted or originate on privately leased bottom within industry

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leased ground areas. The harvest of “managed stocks” of oysters from the natural beds in Delaware Bay is closely supervised and managed by the Department. This management program is a longstanding, collaborative effort between the shellfish industry and Council, Rutgers University and the Department. Oyster “cultivation” or aquaculture is a form of agriculture in New Jersey and is established pursuant to N.J.S.A. 4:27-6. In Delaware Bay, oyster cultivation typically occurs when small oysters are harvested from the managed beds and are transplanted to lease parcels for grow-out to market. Additionally, industry members may also elect to plant clean shell in unison with the oyster’s spawning period in an effort to provide a clean surface for setting oysters or “spat” (i.e., baby oysters).

This rule proposal will continue the regulations by which the direct market program has been operating since 1996. The direct market program is a program where oysters are harvested from the natural beds and taken directly to market in an effort to avoid the grow-out phase of cultivation due to increased disease and predatory losses often encountered in the leased areas. These rules are contained in proposed Subchapter 2 (Direct Market Program). Subchapter 3 (Oyster transplant season), provides the framework for the harvest of oysters from the State’s natural seed beds for transplanting directly to the leased grounds in the lower Delaware Bay, a common practice before oyster disease conditions greatly reduced the benefits of this harvest option. This subchapter retains the rules by which the fishery operates during this harvest program. Although this management option has not been employed in many years due to high disease levels often present in the planting grounds, the proposed readoption maintains this harvest option unchanged for future use if disease and environmental conditions are suitable.

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Inasmuch as the readoption proposal maintains the regulations by which the industry has been operating since the direct market program's inception in 1996 with no changes to the oyster transplant season, the Department believes that the proposed readoption will have a minimal impact upon agriculture in New Jersey. Furthermore, the readoption and maintenance of these rules allows the Department to keep in place appropriate cultivation and other management practices necessary for the long-term sustainability of the resource. Therefore, the Department believes that the readoption will have an overall positive impact on agriculture.

Regulatory Flexibility Statement

In accordance with the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., the Department has reviewed the reporting, recordkeeping and other compliance requirements that the rules proposed for readoption impose on small businesses.

Although most oyster harvesters are "small businesses" as defined by the Regulatory Flexibility Act, the paperwork involved with the oyster dredge licenses, oyster leases and harvest reporting is minimal. Likewise, the Department has determined that compliance with the harvest requirements imposed by the rules in this chapter will not be burdensome to small business oyster harvesters. The proposed readoption will not increase reporting requirements for oyster dredge vessel and oyster tonger licensees. The Department anticipates that small businesses affected by the proposed readoption will not need additional professional services or need to incur additional capital costs in order to comply with the rules. In developing this rule proposal, the Department has balanced the need to protect and preserve the State's oyster resources against

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the economic impact of the proposed readoption on small businesses. The Department has determined that reducing the requirements applicable to those meeting the definition of small businesses would undercut the purpose of the rules and place the continued viability of the resource at risk. Therefore, no exemption from coverage for small businesses is provided.

Smart Growth Impact

Executive Order No. 4 (2002) requires State agencies which adopt, amend or repeal any rule adopted pursuant to N.J.S.A. 52:14B-4(a) of the Administrative Procedure Act to describe the impact of the proposed rule on the achievement of smart growth and implementation of the New Jersey State Development and Redevelopment Plan (State Plan). The Department has evaluated this rulemaking to determine the nature and extent of the rule readoption impact on smart growth and the implementation of the State Plan. The oyster management rules at N.J.A.C. 7:25A do not implicate land use policies or infrastructure development and, therefore, do not have any impact on the achievement of smart growth. The rules are intended to conserve the State's natural resources, which is one of the overall goals of the State Plan. Accordingly, the oyster management rules are consistent with the goals of the State Plan.

Housing Affordability Impact

Pursuant to N.J.S.A. 52:14B-4(a), the Department has evaluated the rule proposed for readoption to determine what, if any, impact they will have on the affordability of housing. The Department has determined that the rules will have no impact on the affordability of housing.

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The oyster management rules at N.J.A.C. 7:25A do not implicate land use policies or development and, therefore, do not have any impact on the average cost of housing.

Smart Growth Development Impact

Pursuant to N.J.S.A. 52:14B-4(a), the Department has evaluated the proposed reoption to determine what, if any, impact these rules will have on smart growth development. The rules do not impact the type or number of housing units, increase or decrease the availability of affordable housing in any manner, or affect new construction within Planning areas 1, 2, or within designated centers, under the State Development and Redevelopment Plan.

Full text of the rules proposed for reoption without amendments may be found in the New Jersey Administrative Code at N.J.A.C. 7:25A.