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**ENVIRONMENTAL PROTECTION**

**DIVISION OF FISH AND WILDLIFE**

**BUREAU OF SHELLFISHERIES**

**Oysters**

**Adopted Amendments: N.J.A.C. 7:25A**

**Adopted Repeals: N.J.A.C. 7:25A-1.2 and 4**

**Adopted Repeal and New Rule: N.J.A.C. 7:25A-1.9**

**Adopted New Rules: N.J.A.C. 7:25A-1.8, 1.10 through 1.15, 2 and 3**

Proposed: June 1, 2009 at 41 N.J.R. 2167(a).

Adopted: May 26, 2010 by Bob Martin, Commissioner,  
Department of Environmental Protection.

Filed: May 28, 2009 as R. 2010 d.132, **with substantive and technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3).

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.

DEP Docket Number: 09-09-04/620.

Effective Date: July 6, 2010.

Expiration Date: October 13, 2010.

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The Department is adopting amendments to and new rules and repeal on the Oysters rules, N.J.A.C. 7:25A, which govern the management of oysters in the Delaware River, Delaware Bay and their tributaries. The adopted amendments, new rules and repeal also concern the management and harvest of oysters in Delaware Bay and the rules regarding oyster dredge vessel licenses. The adopted amendments, new rules and repeal additionally reorganize the existing subchapters and incorporate provisions reflecting how the fishery has been operating since the start of the direct market harvest season in 1996.

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

**Summary of Public Comments and Agency Responses:**

The Department accepted comments on the June 1, 2009 proposal through July 31, 2009. The following persons submitted written comments.

1. Walter J. Canzonier, Aquarius Associates
2. Douglas H. Fisher, Secretary, New Jersey Department of Agriculture
3. John Kraeuter, Rutgers University
4. Scot Mackey, Garden State Seafood Association

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A summary of the comments received and the Department's responses follows. The number(s) in parentheses after each comment identifies the respective commenter(s) listed above.

### **General**

1. COMMENT: The Department is commended for working with the commercial oyster industry in the development of needed revisions and updates to the oyster rules. (2, 4)

RESPONSE: The Department acknowledges the comments in support of the purpose of the proposed amendments.

2. COMMENT: The Department's use of the Rutgers University Haskin Shellfish Laboratory (Rutgers University) as a resource for the management of the oyster resource is supported. (4)

RESPONSE: The Department acknowledges the comments in support of the use of Rutgers University as a resource in the management of the oyster resource. The proposed amendments and new rules will not significantly alter the role that Rutgers University currently fills. The Department has traditionally utilized the advice of Rutgers University in matters related to the oyster management program. The strong partnership between the oyster industry, Rutgers University and the Department has allowed for the development

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of a significant stock assessment program, which has allowed for the establishment of a sustainable fishery in Delaware Bay. Each year the Division of Fish and Wildlife (Division) within the Department, in consultation with the Council and Rutgers University, reviews the quantitative oyster resource data collected during the annual fall survey of the natural oyster seed beds. This data is peer reviewed by a stock assessment review committee and harvest allocation recommendations are forwarded to the Division and Council. The Division, in consultation with the Council, sets the annual quantity of the oyster resource (in bushels) that may be harvested from the State's natural seed beds by all licensed oyster vessels during a harvest season (the "annual harvest quota").

3. COMMENT: The term "tagged" throughout the rule should be replaced with "affixed." (1)

RESPONSE: The terms "tagged" and "affixed" are used interchangeably in these rules in accordance with their commonly understood meanings. These terms have been utilized without issue and have been retained in the rules.

4. COMMENT: The interchangeable use of "catch" and "harvest" between the regulations and the statute could cause confusion. (1)

RESPONSE: As indicated by the commenter, both terms are used extensively in the Act (see, for example, N.J.S.A. 50:3-3 and 50:2-1), and have been used previously in

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these rules interchangeably without creating confusion. The Department believes that the definition of the term “harvest” at N.J.A.C. 7:25A-1.3 is clear and that the context where the word “catch” is used in both the Act and the rules makes it clear that this term is used in its commonly understood meaning, making further definition unnecessary.

5. COMMENT: The proposed amendments regarding vessel operability are too rigid. If a vessel was inoperable, but was being towed in a safe manner, the Department should not prevent the licensee from harvesting his respective quota. (4)

RESPONSE: The term “validly licensed” is amended to more clearly express the requirement that oyster dredge vessels licensed pursuant to N.J.S.A. 50:3-1 must be mechanically capable of the commercial dredging of oysters under their own motive power at the time of license application or renewal.

This term has been part of the rules since 1991 and is being amended only to more clearly describe the intent that a vessel must be maintained to a minimum level of operability. The requirement that licensed oyster vessels must be entirely capable of commercial dredging harvest under their own power has been consistently supported by the Council and has been upheld in administrative law proceedings. However, as there have been differing interpretations of operability within the industry, including the opinion that a licensed vessel could meet the operability standard even if it has to be towed by another vessel in order to harvest its quota, the Department determined that

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clarification of this definition was appropriate. Since the establishment of the limited entry fishery over 25 years ago, vessel integrity (including a sound hull and working engine) has been a key aspect of the regulation of the Delaware Bay oyster fishery. Requiring that vessels be maintained in an operable condition helps assure that licenses in this limited entry fishery are held by active harvesters.

6. COMMENT: The act of transplanting of oysters to leased areas for grow-out is “aquaculture” (proposed Subchapter 3, Traditional Bay Season), which is considered agriculture in New Jersey. The statement in the Agricultural Industry Impact section that “the proposal is not expected to have any impact on agriculture” should be amended. (1, 2)

RESPONSE: Oysters are typically produced and marketed in Delaware Bay utilizing one of two methods: 1) the “managed” method, in which oysters are harvested from natural or heavily managed stocks and/or 2) the “cultivated” method, in which oysters are planted or originate on privately leased bottom within industry 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 under this chapter. 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

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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 catch setting oysters or "spat" (that is, baby oysters).

The adopted amendments codify the rules 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 Subchapter 2, Direct Market Harvest Season. 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, previously codified at N.J.A.C. 7:25A-1.9, by which the fishery operates during this harvest program (known under the prior rules as the "Bay Season"). Although this management option has not been employed in many years due to high disease levels often present in the planting grounds, the reorganization of the chapter and amendments adopted at this time maintain this harvest option largely unchanged for future use if disease and environmental conditions are suitable.

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Adopted amendments that incorporate the general control methods by which the fishery operates on a daily basis, such as harvest notification requirements, harvest tag purchasing provisions, tagging requirements and the setting of harvest season dates, would continue to be applicable to the agriculture industry should the industry become active if disease and environmental conditions improve in the future. Inasmuch as the amendments being adopted at this time codify the methods by which the industry has been operating since the direct market program's inception in 1996, with few changes to the rules governing the oyster transplant season, the Department believes that, if there are any impacts on agriculture/aquaculture as a result of the adopted amendments, the impacts of those changes to the agriculture industry will be minimal.

7. COMMENT: The Department should amend N.J.A.C. 7:25A to allow vessel owners to consolidate and harvest up to four quotas on a single harvest vessel. (4)

RESPONSE: Such changes would be too substantive to make on adoption and require opportunity for public comment. At the request of the New Jersey Shellfisheries Council and based on a list of recommendations developed by an industry review committee, the Department is considering proposing amendments to N.J.A.C. 7:25A in the near future that would allow for "license consolidation" in appropriate circumstances.

## **Subchapter 1. Oyster Management**



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**N.J.A.C. 7:25A-1.1 Purpose and scope**

8. COMMENT: The placement of the phrase “with the exception of the leased areas” within parentheses in N.J.A.C. 7:25A-1.1 is inappropriate. Instead, this text should be set off by the use of commas. (1)

RESPONSE: While this change does not in any way impact the meaning of this provision, for consistency with punctuation used for similar language in other parts of the rule (see, for example, N.J.A.C. 7:25-1.8), the Department has made the suggested change on adoption.

**N.J.A.C. 7:25A-1.3 Definitions**

9. COMMENT: The dates of the direct market harvest season, as defined in N.J.A.C. 7:25A-1.3, conflict with the dates established in proposed N.J.A.C. 7:25A-2.4(a). (3)

RESPONSE: N.J.S.A. 50:3-8 provides that the Commissioner, after consultation with the Delaware Bay Section of the Shellfisheries Council (Council), prescribes the times and the manner in which oysters may be caught or taken from Delaware River, Delaware Bay or their tributaries above the southwest line. N.J.S.A. 50:3-9 provides that no person shall possess, sell or attempt to sell any oysters caught or taken from any natural oyster beds of the Delaware River, Delaware Bay or Maurice River Cove above

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the southwest line, except from and including April 1 to and including June 30 of each year or as otherwise determined by the Commissioner after consultation with the Delaware Bay Section of the Shellfisheries Council. Prior to January 13, 2008, N.J.S.A. 50:3-9 provided that the season for oysters taken from natural oyster beds above the southwest line was to run from April 1 to June 30 of each year. Effective January 13, 2008, N.J.S.A. 50:3-9 was amended to include the text “or as otherwise determined by the commissioner after consultation with the Delaware Bay Section of the Shellfisheries Council.” This language was added to the statute to allow the Commissioner, in consultation with the Council, the ability to modify the opening and closing dates of the direct market season. The definition of “direct market harvest season” at N.J.A.C. 7:25A-1.3 reflects the statutory framework and the ability of the Commissioner and the Council to set opening and closing dates other than April 1 and June 30, respectively.

As part of this rulemaking, the Commissioner, in consultation with the Council, has determined that the dates for the opening and closing of the direct market harvest season (Subchapter 2) could commence on April 1 and may extend through November 30, based on a number of variables. This determination is reflected in the rule adopted at this time at N.J.A.C. 7:25A-2.4(a).

In accordance with N.J.S.A. 50:3-8 and 50:3-9, the opening and closing dates of the direct market harvest season and the oyster transplant season could be modified at a

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future time by the Commissioner, in consultation with the Council. Modification of these dates would require amendment to N.J.A.C. 7:25A through rulemaking.

The flexibility afforded by the statute to the Commissioner, in consultation with the Council, allows for the establishment of appropriate harvest season dates to maximize the harvest of the fishery while ensuring protection of the oyster resource.

10. COMMENT: What provisions will the Department make to allow for the use of containers that hold less than 2,150.42 cubic inches, as established in the definition of the term “bushel.” (1)

RESPONSE: “Bushel” is defined as the volume of oysters within the shell containerized in baskets or bags having a capacity of “not more than one standard bushel” (as defined at N.J.S.A. 51:1-16) and is a primary mechanism used by the Division to monitor oyster harvest (that is, dockside landings) and manage the oyster resource of the Delaware River, Delaware Bay and their tributaries. Additionally, the monitoring program assures that the associated landing fees are collected for the continuance of the Oyster Cultch Program. A basket or bag with a capacity of one standard bushel is the most practical minimum capacity container for both resource management and collection of required landing fees. A harvester would be permitted to utilize a container that had a capacity of less than 2,150.42 cubic inches, which by definition is established as a maximum volume. However, that reported harvest would be recorded as the number of

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bushels harvested. It is extremely unlikely that a harvester would utilize a container that holds less than the maximum volume of oysters as permitted by rule.

11. COMMENT: The term “oyster cultch program” should be amended to include additional language to distinguish the enhancement activities that occur under this program from those that might be conducted by industry on privately held lease grounds.

(1)

RESPONSE: The oyster cultch program is defined as the program governing the purchase and planting of shell or other cultch material in order to increase oyster recruitment or for general bed maintenance. The program also includes other enhancement activities such as, but not limited to, the transplanting of seed oysters within the Delaware River, Delaware Bay and their tributaries and other support activities. The fees collected from harvesters are deposited into the oyster resource development account and disbursed only for the enhancement and management of the oyster resource. Consequently, the Department does not believe any amendment of the definition of “oyster cultch program” is necessary.

12. COMMENT: The removal of the term “natural seed bed” from N.J.A.C. 7:25A-1.3, Definitions, creates numerous inconsistencies throughout the rule. The commenter cited 31 instances where the removal of this term from the definitions section N.J.A.C. 7:25A-1.3 would create inconsistencies. (3)

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RESPONSE: The definition of the term “natural seed beds” has not been removed from the rules. The term “natural seed beds” is defined as any of the natural beds or grounds in Delaware Bay or Delaware River above the southwest line, except that area known as Section "E." By convention, when a term within the definition section of existing rules is not proposed for amendment, the existing definition of the term does not appear as part of the proposal. Instead, an ellipsis appears as a placeholder to indicate that additional text, not reproduced in the proposal as it is not proposed for amendment, appears in the Code. If this term had been proposed to be removed from the rules, the commenter’s concerns would have been justified. However, as the term continues to be part of the Oysters rules, without change, no further action is necessary.

**N.J.A.C. 7:25A-1.5 Substitution, exchanges or transfers of licensed oyster dredge vessels; license renewal**

13. COMMENT: The amendments to extend the replacement period for vessels lost, destroyed or disabled from two years to four years are supported. (4)

RESPONSE: The Department acknowledges the comment in support of the amendments.

**N.J.A.C. 7:25A-1.7 Expiration and renewal of Section E lot leases**

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14. COMMENT: The Department has maintained that there are “unused” leases, and that, because they are not being used, there is no need to grant new leases, even in other areas. The Section E leases located in Delaware Bay are the only leases that have a “take back” clause (for example, for a demonstrated lack of utilization during the calendar year term of the lease) within the regulations. Why has the Department proposed to eliminate it? While the commenter agrees that the proposed rule amendments would bring this lease section into conformity with other Delaware Bay lease sections, he does not understand why this change is occurring. (3)

RESPONSE: The Department is removing the provision that requires proof that the Section E lease lots have been “actively worked.” Higher disease pressure and increased predation rates are often observed throughout the leased grounds. The higher mortalities observed can often make the industry’s use of these leases an uncertain proposition, with some industry members experiencing high losses in some years. Because of these conditions, the Department determined that rescinding leases for “inactivity” during a single calendar year in the face of the intermittently higher disease pressure within only one of the five leased sections sited in Delaware Bay (lease Sections A through E) was onerous to Section E leaseholders.

**N.J.A.C. 7:25A-1.8 Fees; Oyster Resource Development Account**

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15. COMMENT: The dedicated account to finance an oyster cultch and enhancement program is supported. The \$2.00 fee is in line with the current costs to plant a bushel of shell (4).

RESPONSE: The Department acknowledges the commenter's support of the funding mechanism for the oyster cultch program. The "Oyster Resource Development Account" was established as a dedicated account in 1996 pursuant to N.J.S.A. 23:3-12.2. All revenues received through the sale of oyster harvest tags for oysters harvested from the Delaware River, Delaware Bay and their tributaries are deposited into this account. Additionally, revenues received from all license fees collected pursuant to N.J.S.A. 50:1-18 (fees for oysters harvested), N.J.S.A. 50:3-2 (oyster dredge vessel license fees) and N.J.S.A. 50:3-20.13 (oyster dealer, planter and shucking house license fees) are deposited in this account. The monies in this dedicated account are allocated to the Division and are disbursed only for the enhancement and management of the oyster resource in the Delaware Bay. Typically, the monies are used to fund the Oyster Cultch Program.

**N.J.A.C. 7:25A-1.9 Designation of landing sites**

16. COMMENT: Does the proposed language at N.J.A.C. 7:25A-1.9 mean that oysters harvested from industry leased grounds would be required to be landed at one of the four designated landing sites? (1, 3)

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RESPONSE: As part of the reorganization of Subchapter 1 and the repeal of Subchapter 4, the Department is recodifying N.J.A.C. 7:25A-4.4, Designation of landing sites, to N.J.A.C. 7:25A-1.9 with amendments. As such, this section continues to maintain the four landing sites currently approved by the Department. This rulemaking does not change the requirement that all oysters harvested from the Delaware River, Delaware Bay and their tributaries, including industry leased grounds, must be landed at a designated sites previously described at N.J.A.C. 7:25A-4.4 and 4.5 and now identified at N.J.A.C. 7:25A-1.9(a). However, the rule no longer ties the landing site designation to licensing of the operator as an oyster dealer, as was previously required at N.J.A.C. 7:25A-4.4. Landing sites were originally established at the waterfront locations of oyster dealers. However, significant declines in the harvestable resource and changes in the composition of the fishery and associated businesses resulted in a sharp decrease in the number of dealer licenses that were issued to these waterfront locations. Since all oysters harvested from the Delaware River, Delaware Bay and their tributaries must be first sold through the holder of a Delaware Bay oyster dealer's license, the former requirement that a designated landing site also be a licensed dealer is no longer necessary.

17. COMMENT: Does N.J.A.C. 7:25A-1.9, Designation of landing sites, also apply to individuals cultivating oysters via non-traditional methods (for example, off-bottom, "rack and bag" systems, etc.) so that they would have to take the oysters to one of the four designated landing sites? (3)



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RESPONSE: Those individuals harvesting from leased grounds by hand (that is, not harvesting from a vessel by any means) are not required to land at one of the four sites described at N.J.A.C. 7:25A-1.9. The Department added to the rules a definition of the term “land.” As used in these rules, “land” means to enter port by vessel in possession of oysters, to dock to a man-made structure in possession of oysters or to begin offloading harvested oysters. Additionally, the terms “offload” and “offloading” are defined as the act of physically separating a container of oysters from a “vessel.” The Department’s intention is to continue to compel harvesters to land and offload oysters “harvested by vessel” at the designated landing areas described at N.J.A.C. 7:25A-1.9. The continuance of this requirement was discussed with the Council, which supports the landing procedures. The terms “land,” “offload,” “offloading,” “vessel” and “harvested by vessel” relate directly to the monitoring and enforcement of harvest quotas. The adopted new rule, like the prior rule, requires that offloading occur at designated landing sites to allow monitoring and enforcement of harvest quotas. If the Department or Council wishes to add or remove landing sites in the future, those locations would need to be added to the rules through rulemaking with an opportunity for comment.

**N.J.A.C. 7:25A-1.10 Requirements and conditions for oyster tonger harvest**

18. COMMENT: The proposed language at N.J.A.C. 7:25A-1.10(a) could be interpreted to mean that a harvester would not be permitted to use “oyster tongs” to harvest oysters from the leased areas, which would be a concern. (3)

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RESPONSE: The Department agrees that leaseholders should not be prevented from using hand tongs on leased grounds. N.J.A.C. 7:25A-1.10(a), as amended on adoption, provides that oysters may only be taken or attempted to be taken by tongs if the person has obtained the required license and harvest tags. In accordance with 2008 amendments to N.J.S.A. 50:2-1 and 50:2-2, shellfish harvesters are required to possess what is now known as a commercial shellfish license. In accordance with N.J.A.C. 7:25A-1.8(a), leaseholders are not required to obtain harvest tags for the harvest of oysters from their leased grounds. Accordingly, in order to take oysters by tonging from their leased grounds, leaseholders only need to possess the appropriate license, but not harvest tags. The Department is modifying N.J.A.C. 7:25A-1.10(a) on adoption to add the words “if applicable” prior to “oyster harvest tags” to clarify that it is not the intent of this section to require leaseholders to obtain harvest tags to harvest from leased grounds. These changes will clarify that, as was the case prior to these amendments, leaseholders may harvest oysters commercially from their leased grounds in Delaware Bay by hand tongs provided that they have obtained a commercial shellfish license pursuant to N.J.S.A. 50:2-2. The Department is additionally making other changes to this section on adoption to avoid any misunderstanding as to the applicability of this provision. First, the Department is replacing the reference to N.J.A.C. 7:25-7.10, which mandates the possession of a license for the take of oysters by tongs or other hand-operated devices, with a direct reference to the statutory provision, N.J.S.A. 50:2-2, that specifies the license (the commercial shellfish license) that must be obtained. The Department is

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replacing the reference to an “oyster license” with the statutory term “commercial shellfish license.” Finally, this section has been modified to clarify that N.J.S.A. 50:3-14 and 50:3-16.3 specify those areas of Delaware River, Delaware Bay and their tributaries where *only* hand tongs can be used to harvest oysters.

19. COMMENT: The requirement that harvesters purchase tags in batches of 50 and 200 is problematic due to the economic hardship that industry would incur. Furthermore, the tags should be refundable, transferable or last for more than one season. (4)

RESPONSE: N.J.A.C. 7:25A-1.10(c) states that commercial shellfish license holders harvesting oysters with tongs from the Delaware River, Delaware Bay and their tributaries are required to purchase tags for the harvest of oysters for the specific season issued. The rules additionally state that tags are non-transferable and non-refundable and that the minimum batch size is 50 (for commercial shellfish license holders) and 200 (for oyster dredge vessel licenses pursuant to N.J.A.C. 7:25A-2.6 and 3.6). These limitations minimize administration costs to the Department. The requirement that oyster dredge vessel license holders purchase non-transferable, non-refundable tags in minimum batches began with the commencement of the direct market program in 1996. The requirement that the batch size be set at a minimum of 200 tags has been in effect since 2006 and has been supported annually by motion at a public meeting of the New Jersey Shellfisheries Council. At the current fee of \$2.00 per bushel, the minimum batch size of 50 and 200 tags represents a cost of only \$100.00 and \$400.00, respectively, and is not

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believed to present an economic hardship for a commercial enterprise. Furthermore, with a dockside value (dollars paid directly to the harvester) of approximately \$40.00 per bushel harvested, this represents only a nominal operating expense to the harvester (approximately five percent), The fee additionally benefits the industry as it is deposited into a dedicated account that is ultimately used to fund enhancement activities which often lead to increased harvest quotas.

**N.J.A.C. 7:25A-1.11 Oyster tonger records required**

20. COMMENT: Is the license referred to at N.J.A.C. 7:25A-1.11 the “commercial shellfish license” or does an “oyster tonger license” still exist? (1)

RESPONSE: In 2008, N.J.S.A. 50:2-2 was amended. In accordance with the amendments, a license for the commercial harvest of shellfish from waters of the State is identified as a commercial shellfish license. Accordingly, the Department has amended the reference to “oyster tonger” in N.J.A.C. 7:25A-1.10, 1.11 and 1.12 to reflect the revised statutory term. Particularly, amendments have been made to the following provisions: N.J.A.C. 7:25A-1.10(a), (b) and (c); 1.11(a), (a)1, (a)4 and (d); and 1.12(b).

21. COMMENT: N.J.A.C. 7:25A-1.12 should be amended to exclude the requirement that leaseholders report all oysters harvested from their leased grounds. (3)

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RESPONSE: Weekly reporting of oyster landings has been a longstanding requirement. Prior to adoption of these amendments and new rules, N.J.A.C. 7:25A-4.5 required oyster dealers receiving oysters harvested from Delaware Bay to provide the Bureau of Shellfisheries weekly oyster landings reports. As part of the reorganization of Subchapter 1 and the repeal of Subchapter 4, the Department recodified N.J.A.C. 7:25A-4.5, Records required, to N.J.A.C. 7:25A-1.12, Oyster dealer records required, with amendments. N.J.A.C. 7:25A-1.12(a) continues the longstanding weekly reporting requirement of oyster landings previously required under N.J.A.C. 7:25A-4.5(a). This subsection specifies that the reporting requirement is applicable not just to oysters harvested from the Delaware Bay, but from the Delaware River, Delaware Bay and their tributaries. The reporting required of oyster dealers in N.J.A.C. 7:25A-1.12(a) is a continuation of a previously existing requirement at N.J.A.C. 7:25A-4.5, Records required, and does not require individual harvesters harvesting from the leased grounds to submit weekly harvest reports (similar to those required for license oyster dredge vessel license holders). Therefore, the adopted amendments do not impose any additional reporting requirements on leaseholders.

## **Subchapter 2. Direct Market Harvest Season**

### **N.J.A.C. 7:25A-2.1 Purpose and scope**

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22. COMMENT: The proposed amendments related to the direct market season successfully maintain the current fishery and management practices that have been used in the past to administer the direct market harvest season and are supported. (4)

RESPONSE: The Department acknowledges the comment in support of the amendments.

**N.J.A.C. 7:25A-2.2 Applicability**

23. COMMENT: Changes should be made to N.J.A.C. 7:25A-2.2(a) to clarify that this section applies to harvesting from the natural seed beds, rather than the entire estuary. (1)

RESPONSE: As stated in the “Purpose and scope” section at N.J.A.C. 7:25A-2.1, the rules contained in Subchapter 2, Direct Market Harvest Season, pertain specifically to the direct market harvest of oysters from the natural seed beds. Furthermore, the definition of “direct market harvest season” at N.J.A.C. 7:25A-1.3 specifies that the direct market harvest season is the harvest of oysters from the natural seed beds. Therefore, the Department believes that no further clarification is necessary.

**N.J.A.C. 7:25A-2.3 General control methods for direct market harvest season**

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24. COMMENT: The Department's proposal to allow the industry to begin harvesting activities at sunrise rather than the currently permitted 7:00 A.M. is supported. (4)

RESPONSE: The Department acknowledges this comment in support of the amendment.

25. COMMENT: N.J.A.C. 7:25A-2.3(b)7, which requires that oyster vessels be marked with the license number at least 18 inches in size, should be clarified to indicate whether it is 18 inches in height or width. (1, 3)

RESPONSE: N.J.A.C. 7:25A-2.3(b)7 states that the top and sides of licensed oyster vessels shall be marked with the license number, each number at least 18 inches in size, clearly legible and in good repair, and with no obstruction to view. The size refers to the height of the license number. This longstanding provision has not proven problematic for either the industry or the Department from an enforcement perspective. However, the Department has replaced the word "size" with the word "height" on adoption to assure that no confusion occurs in the future. The same amendment has been made on adoption to an equivalent requirement at N.J.A.C. 7:25A-3.3(b)8.

**N.J.A.C. 7:25A-2.5 Direct market harvest limitations; quota; control dates**

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26. COMMENT: How would N.J.A.C. 7:25A 2.5(b) be modified if the industry opted to consolidate licenses? (3)

RESPONSE: As indicated in the Response to Comment 7, changes to the rules necessary to accomplish such a change would be too substantive to make on adoption and require opportunity for public comment. The Department is considering proposing amendments to N.J.A.C. 7:25A in the near future that would allow for “license consolidation” in appropriate circumstances. Specific language to accomplish such a change would be included in that proposal.

27. COMMENT: The task of dividing the annual harvest quota should be assigned to the Council. (3)

RESPONSE: The Council, in accordance with N.J.S.A. 50:1-18, consults and advises the Commissioner regarding shellfish management issues. Pursuant to N.J.S.A. 50:1-5, the Commissioner has full control and direction of the shellfish industry and resource. Therefore, N.J.A.C. 7:25A-2.5(b) accurately reflects the responsibilities of the Council, Department and Division. The adopted rule amendments and new rules do not alter these longstanding roles and responsibilities, which are established in both statute and regulation.

### **Subchapter 3. Oyster Transplant Season**



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**N.J.A.C. 7:25A-3.1 Purpose and scope**

28. COMMENT: The proposed amendments related to the oyster transplant season successfully maintain the current fishery and management practices that have been used in the past to administer the oyster transplant season and are supported. (4)

RESPONSE: The Department acknowledges the comment in support of the amendments.

**N.J.A.C. 7:25A-3.3 General control methods for oyster transplant season**

29. COMMENT: N.J.A.C. 7:25A-2.3(d)3 provides harvesters an option to containerize when electing to transplant to an industry leased ground during a direct market program season. The containerization options are not clearly defined in N.J.A.C. 7:25A-3.3(b)4 for harvesters electing to transplant to an industry leased ground during an oyster transplant season (1)

RESPONSE: The rules at N.J.A.C. 7:25A-2 and 3 address the options and requirements for the harvest of oysters for the direct market harvest season and the oyster transplant season, respectively. Prior to the amendments adopted at this time, the rules did not specifically address containerization requirements during the traditional “Bay

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Season.” Harvesters have not been required in the past to containerize oysters harvested if the oysters were to be transplanted to leased grounds. As indicated by the commenter, consistent with this past practice, the Department has provided harvesters during the direct harvest season with the option of not containerizing oysters harvested when the harvester has elected to transplant the oysters to leased ground (see adopted N.J.A.C. 7:25A-2.3(d)3). The Department did not intend to require harvesters during the oyster transplant season, who are similarly planting the oysters harvested to leased grounds, to containerize those oysters to be planted. To clarify this, the Department has modified N.J.A.C. 7:25A-3.3(b)4 on adoption to explicitly provide, consistent with N.J.A.C. 7:25A-2.3(d)3, that containerization is optional when the oysters harvested are to be transplanted to leased grounds during an oyster transplant season.

30. COMMENT: What is the intent of proposed N.J.A.C. 7:25A-3.3(b)11, which states that “oysters may be taken for market during any period when the natural seed beds are legally opened?” Does this refer to the period of time when oysters may be taken for market from the natural seed beds for transplanting to leases or is there some cryptic element in the last sentence? (1)

RESPONSE: N.J.A.C. 7:25A-3.3(b)11 provides the Division, in consultation with the Council, the flexibility to allow marketing or sale of seed oysters during a designated period during the oyster transplant season. N.J.A.C. 7:25A-3.3(b)11 provides that seed oysters can not be marketed or sold for any other purpose unless the Division, in

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consultation with the Council, designates times, manner and section(s) of the natural seed beds from which seed oysters may be taken for market during any period when the natural seed beds are legally opened. This paragraph continues the limitation, which was previously codified at N.J.A.C. 7:25A-1.9(d) with minor wording changes that do not impact the content of the provision.

31. COMMENT: N.J.A.C. 7:25A-3.3(b)12 unnecessarily forces a vessel to plant each day's catch of oysters prior to being permitted to return to the seed beds to harvest again. That requirement would be especially problematic (and less cost effective for the industry) in times when oyster seed densities are at low levels. (1)

RESPONSE: Prior to adoption of these amendments and new rules, N.J.A.C. 7:25A-1.9(d), which governed the "Bay Season" harvest program, stated that "all seed oysters shall be planted on the day taken by spreading them loosely on the bottom, not in bags, baskets, or other containers." This requirement has been retained in adopted N.J.A.C. 7:25A-3.3(b)11, as referenced in N.J.A.C. 7:25A-3.3(b)12. The control measures described in this section, including the requirement that oysters harvested must be planted on the day harvested, are necessary to effectively monitor the harvest of oysters from the State's natural seed beds and, thereby, effectively manage the Delaware Bay oyster resource for the long-term benefit of the fishery. This requirement also avoids unnecessarily increasing risks to public health from allowing a raw, consumable food product to be maintained on a vessel overnight without refrigeration. The continuation of

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this requirement was recently discussed at a regularly scheduled meeting of the New Jersey Shellfisheries Council. The Council stated its strong support for the requirement that oysters be planted on the day harvested. The Department believes that this requirement is necessary for effective management of the oyster resource.

**N.J.A.C. 7:25A-3.4 Oyster transplant season; closed harvest areas**

32. COMMENT: What is the intent of proposed N.J.A.C. 7:25A-3.4(f)1? Would this section prevent the movement of oysters during a transplant period from a bed that is closed for public health reasons? This section should be made more flexible as the Department might want to move oysters from one bed to another bed for other purposes.  
(3)

RESPONSE: N.J.A.C. 7:25A-3.4(b) states that the Division, in consultation with the Council and with the advice of the Haskin Shellfish Research Laboratory, may open or close certain beds or groups of beds as may be necessary for the conservation of the oyster resource and the preservation of the oyster industry. N.J.A.C. 7:25A-3.4(e) states that an Advisory Committee may undertake physical tests of all areas opened near the end of each week, for the purpose of providing a recommendation to the Division to close any or all beds opened as provided under N.J.A.C. 7:25A-3.4(a). N.J.A.C. 7:25A-3.4(f) further provides that, based upon the results of the tests undertaken and the recommendation of the Advisory Committee, the Division, in consultation with the

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Council, may immediately close those beds as may be necessary for the preservation and improvement of the shellfish industry. The type of closure described at N.J.A.C. 7:25A-3.4(f)1 is not related to public health, but rather for the preservation of the resource on those beds. Once the Division has closed a bed or group of beds pursuant to N.J.A.C. 7:25A-3.4(f)1, no commercial harvest can be undertaken by the industry, unless the bed or group of beds is reopened. However, this section would not preclude the Division from coordinating an intermediate transplant program from a bed or groups of beds that were located in waters classified as special restricted or seasonal. Consequently, it is unnecessary to amend the rule to provide any further flexibility.

**Summary of Agency-Initiated Changes:**

In addition to the changes in response to comments explained above, the Department is modifying the following provisions on adoption:

**N.J.A.C. 7:25A-1.11 and 1.12**

In addition to changing the reference to “oyster tonger license” to “commercial shellfish license” to reflect the revised statutory term as discussed in the Response to Comment 20, the Department has modified subsection (a) of N.J.A.C. 7:25A-1.11, Commercial shellfish license records required, to clarify that the weekly harvest reporting requirement

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is applicable to commercial shellfish license holders harvesting oysters with tongs from the Delaware Bay, Delaware River and their tributaries, excluding the leased areas.

The commercial shellfish license, established pursuant N.J.S.A. 50:2-2, allows a person to take shellfish (defined as any species of benthic mollusks, except for conchs) from any natural grounds in the waters of the State. However, as N.J.A.C. 7:25A applies specifically to the taking and reporting of oysters harvested from the Delaware River, Delaware Bay and their tributaries, N.J.A.C. 7:25A-1.11(a) has been modified to include an indication that its requirements are applicable to the harvest of oysters with tongs from the Delaware Bay, Delaware River and their tributaries, excluding the leased areas, to reinforce that the reporting requirements established there only apply to the harvest of oysters in this specific harvest area. Similar changes have been made to N.J.A.C. 7:25A-1.11(a)1, (a)4 and (c).

The Department has modified N.J.A.C. 7:25A-1.11(d) to clarify that, as indicated in N.J.A.C. 7:25A-1.1, these rules are applicable to the harvest of oysters from Delaware River, Delaware Bay and their tributaries.

### **Federal Standards Statement**

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N.J.S.A. 52:14B-4 et seq. requires 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 adopted amendments, repeals and new rules are 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, no further analysis is required.

**Full text** of the adopted amendments and new rules follows (additions to proposal indicated in boldface with asterisks **\*thus\***; deletions from proposal indicated in brackets with asterisks \*[thus]\*):

#### 7:25A-1.1 Purpose and scope

This chapter constitutes the rules governing the issuance, renewal, substitution and transfer of oyster dredging licenses, the leasing of oyster ground in Section E in Delaware Bay, the taking and reporting of oysters from the Delaware River, Delaware Bay and their tributaries\*,\* \*[(]\*with the exception of the leased areas\*[]]\*\*,\* and 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. The oyster management program, which includes, as a component, the oyster cultch and resource enhancement

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program, includes a limitation on the number of available licenses, a limitation on harvest to specific fishing times and areas and the establishment of a seasonal harvest quota.

### 7:25A-1.3 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

• • •

"Seed oysters" means all oysters harvested from any of the lands lying under the tidal waters of the Delaware River, Delaware Bay and their tributaries\*,\* \*[(]\*with the exception of the leased areas\*[]]\*. For purposes of fee calculations pursuant to N.J.A.C. 7:25A-2.6 and 3.6, oysters that have been removed from natural seed beds and planted on leased areas are not considered to be seed oysters subsequent to planting in the leased area.

• • •

7:25A-1.10 Requirements and conditions for \*[oyster tonger]\* **\*commercial\*** harvest **\*of oysters with tongs\***



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(a) No person shall catch, take or attempt to catch or take by tonging or by any hand-operated device any oysters in the Delaware River, Delaware Bay and their tributaries without first obtaining *\*[an oyster]\** **\*a commercial shellfish\*** license required by *\*[N.J.A.C. 7:25-7.10]\** **\*N.J.S.A. 50:2-2\*** and **\*if applicable,\*** oyster harvest tags as described in (c) below. **\*In specific areas of the Delaware River, Delaware Bay and their tributaries, as described at N.J.S.A. 50:3-14 and 50:3-16.3, oysters may be harvested by hand tongs only.\*** *\*[The harvest of oysters from the Delaware River, Delaware Bay and their tributaries by hand tongs is permissible in those areas described at N.J.S.A. 50:3-14 and 50:3-16.3.]\**

(b) The **\*commercial\*** harvest of oysters with tongs from Delaware River, Delaware Bay and their tributaries, excluding the leased areas, shall be subject to the following requirements.

1.– 3. (No change from proposal)

(c) *\*[Oyster tonger]\** **\*Commercial shellfish\*** license holders **\*harvesting oysters with tongs\*** shall pay a landing fee for each bushel of oysters landed in accordance with N.J.A.C. 7:25A-1.8(a). Tags will be available from the Division's Delaware Bay Office in batches of 50 or more. Tags provided under this section shall be valid only for the season for which issued and are non-transferable. Refunds will not be given for unused tags.

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7:25A-1.11 \*[Oyster tonger]\* **\*Commercial shellfish license\*** records required

(a) All \*[oyster tonger]\* **\*commercial shellfish\*** license holders **\*harvesting oysters with tongs from the Delaware Bay, Delaware River and their tributaries, excluding the leased areas,\*** shall provide to the Division weekly oyster harvest reports on forms supplied by the Division. Weekly reports shall include the following information:

1. The name of the \*[oyster tonger]\* license holder and **\*the commercial shellfish\*** license number;

2.– 3. (No change from proposal)

4. The name and signature of the \*[oyster tonger]\* license holder attesting to the validity of the report.

(b) Weekly \*[oyster tonger]\* harvest reports shall be submitted to:

Delaware Bay Office

New Jersey Department of Environmental Protection

Division of Fish and Wildlife

1672 E. Buckshutem Road

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(c) Weekly \*[oyster]\* harvest reports must be received by the Division no later than five business days after the end of the week during which oysters were harvested.

(d) The renewal of \*[an oyster tonger]\* **\*a commercial shellfish\*** license **\*for the harvest of oysters with tongs from the Delaware River, Delaware Bay and their tributaries\*** is specifically conditioned on compliance by the licensee with all the requirements of this chapter. The Department shall not renew \*[an oyster tonger]\* **\*a commercial shellfish\*** license for a licensee who has not submitted the required weekly reports in a timely fashion, as specified in this section.

(e) (No change from proposal)

#### 7:25A-1.12 Oyster dealer records required

(a) (No change from proposal)

(b) Whenever oysters are delivered for sale by the harvester to the oyster dealer, the oyster dealer shall make an entry on the weekly oyster dealer report form obtained from the Division noting the date, oyster dredge vessel license number, oyster planter license number or \*[oyster tonger]\* **\*commercial shellfish\*** license number, and the

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number of bushels landed by the harvester and received by the oyster dealer. Each entry shall be signed by the oyster dealer.

(c) – (g) (No change from proposal.)

7:25A-2.3 General control methods for direct market harvest season

(a) (No change from proposal.)

(b) The requirements and conditions for the direct market harvest of oysters from natural seed beds in Delaware Bay are as follows:

1. – 6. (No change from proposal.)

7. The top and sides of licensed oyster dredge vessels shall be marked with the license number, each number at least 18 inches in *[size]* **height**, clearly legible and in good repair and with no obstruction to view.

8. (No change from proposal.)

(c) – (d) (No change from proposal.)

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7:25A-3.3 General control methods for oyster transplant season

(a) (No change from proposal)

(b) The requirements and conditions for the harvest of seed oysters from **\*the\*** State's natural seed beds in Delaware Bay are as follows:

1. – 3. (No change from proposal)

4. Prior to commencement of planting, Division personnel may meet the harvest vessel to confirm the volume of oysters being transplanted. At that time, the harvester shall provide Division personnel with the appropriate number of tags (as described at N.J.A.C. 7:25A-3.6) for the volume to be planted. Tags shall be used sequentially as issued for the specific, appropriately licensed oyster harvest vessel. The Division will verify the harvest total and collect the required harvest tags. No oysters shall be planted until after the volume is confirmed or the Division has given the harvester approval to plant the oysters by telephone at (856) 785-0730 or VHF radio should circumstances prevent an on-water inspection. If an on-water inspection is not conducted, the harvester shall return the number of tags corresponding to the actual bushel volume transplanted to the Delaware Bay Office within five business days. **\*Containerization of oysters harvested from the natural seed beds during the oyster transplant season is optional when the harvester elects to transplant to leased ground.\***

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5. – 7. (No change from proposal.)

8. The top and sides of licensed oyster dredge vessels shall be marked with the license number, each number at least 18 inches in *\*[size]\** **\*height\***, clearly legible and in good repair and with no obstruction to view.

9. – 12. (No change from proposal.)

(c) (No change from proposal.)