

## Notice of Agency Rule-making Proposal

AGENCY: 13-188-Department of Marine Resources

CHAPTER NUMBER AND TITLE: Chapter 7 Requirements for Municipalities Having Shellfish Conservation Programs

TYPE OF RULE (*check one*):          Routine Technical          Major Substantive

PROPOSED RULE NUMBER (*leave blank; to be assigned by Secretary of State*):

BRIEF SUMMARY: This rulemaking is proposed to modify and clarify the requirements of Municipal Shellfish Programs so that the Department of Marine Resources can consistently apply the same standards to all programs. These changes include amending current definition of “period of issuance” and providing a new definition for the effective license year. Additionally, regulations regarding holding and removing shellfish on and from Municipal Limited Purpose Aquaculture license sites held by Shellfish Committees have been developed. The process for requesting permission to complete a shellfish resource survey in a closed area and the requirements for such surveys have been defined. Finally, the length of the comment period for Shellfish Programs to provide recommendations on intertidal mussel dragging has been increased from 21 to 30 days.

Date, time and location of PUBLIC HEARING (*if any*): February 12, 2024, 5:00 p.m., in-person at the Sorrento-Sullivan Rec Center, 1776 US-1 Sullivan, ME. February 13, 2024, 4:30 p.m. in-person at the Marquardt Building, Room 118, 32 Blossom Lane, Augusta or remotely via Microsoft Teams. Remote access information is posted to DMR’s website under “Meetings.”

COMMENT DEADLINE: February 23, 2024

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CONTACT PERSON FOR SMALL BUSINESS IMPACT STATEMENT (*if different*): Same

FINANCIAL IMPACT ON MUNICIPALITIES OR COUNTIES (*if any*): None

STATUTORY AUTHORITY FOR THIS RULE: 12 MRS 6671

SUBSTANTIVE STATE OR FEDERAL LAW BEING IMPLEMENTED (*if different*): Same

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## DEPARTMENT OF MARINE RESOURCES

### Chapter 7 - Requirements for Municipalities having Shellfish Conservation Programs

#### 7.10 Definitions

In addition to the definitions set forth in 12 M.R.S. §6001, the following definitions shall apply in interpretation of Chapter 7.

1. "Shellfish" means shellstock clams (surf clams, razor clams and soft-shelled clams; 12 M.R.S. §6001(41)), quahogs other than mahogany quahogs, and oyster shellstock (12 M.R.S. §6601(6)).
2. "Municipal Conservation Closures" means an area closed to shellfish harvesting by a municipality or regional program under a municipal ordinance and a municipal management plan, with permission from the Department, separate from the Growing Area classification, for specific reasons, such as, but not limited to, shellfish seeding, flat rotation or winter harvesting.
3. "Shellfish Management Plan" is a written description of the biological measures used to accomplish the management provisions in the municipal shellfish conservation ordinance, including but not limited to an annual review, budget, and objectives for the following year.
4. "Municipal Shellfish Conservation Ordinance" means a shellfish conservation program formally adopted by a municipality in accordance with 12 M.R.S. §6671(2) and (4) and follows the management provisions in accordance with 12 M.R.S. §6671(3).
5. "Municipal Shellfish Transplant Permit" means a permit issued to a municipality or regional program by the Department to possess undersized shellfish from areas classified as approved, conditionally approved, restricted, conditionally restricted or prohibited. The permit allows the municipality or regional program to possess undersized shellfish for the purpose of reseeding shellfish areas. In the absence of a permit, the harvesters and the municipal or regional program are in violation of 12 M.R.S. §6681.
6. "Period of issuance" means the first 90 days during which a municipality reserves or sells shellfish harvest licenses each year, any twelve month period designated by the municipality, unless a municipality chooses to issue unlimited licenses limit the number of licenses it issues in which case it shall mean the period starting when the municipality begins to reserve or sell shellfish licenses for an effective license year until the last day of the effective license year ~~the first 90 days during which a municipality issues shellfish harvest licenses each year.~~
7. "Effective license year" means any twelve month period designated by the municipality in which a shellfish harvesting license is effective.

#### 7.20 Shellfish Management Plan

1. Any municipality that implements a municipal shellfish conservation program as authorized under 12 M.R.S. §6671, must, with the assistance of the Department of Marine Resources (Department), prepare and adopt a shellfish management plan which consists of:
  - A. A written statement of goals and objectives the municipality plans to achieve as a result of its conservation program; and
  - B. A description of the various conservation measures the municipality intends to employ to reach those goals. The measures may include but are not limited to licensing, limiting the number of shellfish harvesters, restricting the time (hours, days or portion of the year) and area where harvesting is permitted, limiting the minimum size of soft-shell clams, limiting the

species or amount of shellfish taken daily by a license class of harvester, transplanting or seeding of shellfish, and protecting the resource from predators by fencing, trapping or other means.

2. The Shellfish Management Plan must be accepted by the Department prior to the Department's approval of a Municipal Shellfish Conservation Ordinance.

### 7.30 Management Responsibilities

Municipalities that have an approved Municipal Shellfish Conservation Ordinance shall meet the requirements under 12 M.R.S. §6671 and the goals, objectives and conservation measures outlined in their Shellfish Management Plan; and they must implement the requirements outlined in this section. The municipality may appoint or elect a shellfish conservation committee to assist the municipality in executing its responsibilities. Municipal responsibilities include:

1. Establishing annually with approval from the Department at least 30 days prior to the period of issuance the number, type and fees of shellfish harvesting licenses to be issued (referred to as the "license allocation") using a Department-approved form. The Department may require justification prior to approving changes to the license allocation.
2. Municipalities with an approved Shellfish Management Plan may be required to conduct resource surveys on a periodic basis of the commercially productive areas within the municipality classified as approved or conditionally approved, using Department-approved methods. The Department may require the municipality to conduct resource surveys prior to approving changes to their Municipal Shellfish Conservation Ordinance. The Department may require the municipality to conduct resource surveys prior to approving changes to their license allocation. The Department may also conduct resource surveys in lieu of or in conjunction with the municipalities.
3. Enforcing the municipal shellfish conservation ordinance by a Department certified Shellfish Warden including but not limited to requirements involving licensing and closures to shellfish harvest; and
4. Submitting annually, on a Department approved form, by April 1<sup>st</sup>, a complete and accurate Municipal Shellfish Management Plan Review, to the Department including the following information: statement of management goals and implementation actions, members of the shellfish committee or staff, shellfish committee meeting schedule, conservation credit information, summary of conservation closures/opening, summary of transplant activities, details on survey data, shellfish management activities undertaken, e.g. spat fall enhancement, predator controls, etc. and related expenses, number of shellfish harvest licenses sold, revenue from license sales and fines, funds raised or appropriated for shellfish management, and summaries of municipal wardens' activities for municipally managed areas.

### 7.35 Revocation of Municipal Shellfish Conservation Ordinance

If a municipality violates or fails to enforce any provision of Chapter 7 or of the approved Municipal Shellfish Conservation Ordinance, or fails to meet Shellfish Management Plan objectives, the Commissioner may revoke approval of the Municipal Shellfish conservation ordinance. Prior to such revocation, the Commissioner shall give written notice to the municipality of the violation or failure, by certified mail, and of the Department's intention to revoke its approval and the basis for the revocation. The municipality has 30 days to respond in writing as to how it may correct the violation or failure or may request a hearing on the matter in accordance with the following paragraph.

The Commissioner shall advise the municipality it has the right to request that an adjudicatory hearing be held before the Department in conformity with 5 M.R.S., Chapter 375 subchapter IV prior to a making a final decision whether to revoke approval. The hearing request must be in writing and must

be received by the Department no later than 10 days after receipt by the municipality of the notice of the Commissioner's intent to revoke the approval of that municipality's shellfish conservation ordinance.

If the Commissioner revokes their approval, the Municipal Shellfish Conservation Ordinance shall, as of the date specified in the Commissioner's revocation notice, no longer be in effect and the area shall thereafter be governed by applicable state law and Department regulation.

#### 7.40 Municipal Licensing of Shellfish Harvesters

1. The number of shellfish licenses allocated to municipal residents and nonresidents shall be established by the municipality and approved by the Commissioner prior to the period of issuance (Chapter 7.10(6)). Licenses unsold after the period of issuance shall be made available to residents and nonresidents alike on a first come, first served basis or by lottery using an official, written list that is posted publicly. Licenses unsold during the period of issuance shall be issued for the original allocated fee in each category regardless of residency. The period of issuance for resident and nonresident licenses for municipalities with limited license allocations shall be the same in accordance with 12 M.R.S. §6671(3-A). The total number of non-resident licenses to be issued by a municipality shall be made available from the start of the period of issuance.
2. Towns with unlimited commercial or recreational license allocations shall make available and issue if applicable on the first day of license sales, to qualifying non-residents, no less than 10% of the total number of resident licenses issued in the previous year. Thereafter, non-resident licenses will be issued according to the 10% rule in accordance with 12 MRS 6671(3-A)(E) and (F).
3. In accordance with 12 M.R.S. §6671(3-A)(E) and (F), the application of the minimum 10% ratio for allocation and issuance of nonresident commercial and recreational licenses is summarized in Table 1.

Municipalities may issue more than the minimum number of non-resident licenses listed.

Table 1.

Number of Resident licenses:	Number of Non-resident licenses:
1-5	0
6-10	1
11-20	2
21-30	3            etc.

4. Municipal shellfish license applicants who complete conservation time (or conservation credit activities) in order to be eligible for a municipal shellfish license according to the Municipal Shellfish Conservation Ordinance, shall remain eligible until they have been issued or offered a shellfish license by the municipality so long as the applicant applies annually for the license.

#### 7.50 Municipal Shellfish Conservation Activities

1. Request for Municipal Shellfish Conservation Closure/Opening

A. Municipal Shellfish Conservation Closure/Opening applications will be reviewed by the Department and permits will be issued based on the applicant's ability to meet the criteria for any conservation action.

B. Municipalities must apply at least 20 days prior to the requested date, in writing on Department approved forms to the Department for a conservation closure or opening.

C. Notification

The Municipality shall provide sufficient notification to the public of any conservation closure or opening by publishing, advertising and/ or posting in public places, an official municipal closure or opening notice signed by the Shellfish Warden or the Department issued permit, five (5) days prior to the initial closure or opening date. The method of notification must be approved by the Department prior to issuance of the permit.

## 2. Municipal Shellfish Transplant and Closed Area Survey Permit Requirements

A. Except as provided in 7.50 (2D), a municipality or regional program with a Municipal Shellfish Conservation Ordinance must have a permit from the Department to possess seed regardless of source (wild or hatchery). In the absence of a permit, the harvesters and the municipal or regional program are in violation of 12 M.R.S. §6681. Municipalities must apply at least 20 days prior to the requested date in writing on Department approved forms to the Department for a Shellfish Transplant Permit.

The supervisor must keep accurate records on a Department approved form (Activity Log) and a copy of the Activity Log must be sent to the Department within ~~20~~30 days of the activity.

B. Shellfish moved from Growing Areas classified as restricted, conditionally restricted in the open status or prohibited must be transplanted to areas closed by the Department for specified amounts of time. Only seed, as defined by DMR Chapter 2.95 A (4), may be transferred from Growing Areas classified as prohibited. ~~If product larger than seed is proposed to be transplanted by a municipality from areas classified as restricted or conditionally restricted in the open status, the~~ The Department may issue a permit for such activities at the Commissioner's discretion based on an assessment of the overall performance of the Municipal Shellfish Conservation Ordinance and the municipality's ability to control prohibited and restricted area transplant activities and enforce closed areas. In order to transplant shellfish ~~larger than seed~~:

1. The Municipality must have a Warden with ~~a minimum of 100 hour MCJA training~~ either a current part-time (LEPS) or full-time law enforcement (BLETP) certification from the Maine Criminal Justice Academy and certification.
2. The warden must be employed by the town for a minimum of 20 hours a week.

C. Seed purchased from out-of-state hatcheries require an Application for Importation, Introduction and/or Relay of Shellfish into Maine Coastal Waters pursuant to Chapter 24.10. Municipalities or regional programs must apply at least 30 days prior to the requested event, in writing, to the Department.

D. In accordance with 12 M.R.S. §6073-A, a municipality or regional Shellfish Committee holding a Limited Purpose Aquaculture License (LPA or Municipal LPA) issued under 12 M.R.S. §6072-C is exempt from any requirement regarding the time of taking or possessing, minimum or maximum length or other minimum or maximum size requirement for any marine organism cultivated on the LPA site and identified in the Municipal Shellfish Conservation Ordinance. This exemption applies only to those

organisms actually cultivated on the licensed area and to seed from approved hatcheries being placed on the LPA site.

- E. A municipality or regional Shellfish Committee holding a Limited Purpose Aquaculture License (LPA or Municipal LPA) issued under 12 M.R.S. §6072-C must have a Shellfish Transplant Permit from the Department of Marine Resource prior to removing marine organisms from the LPA site. Municipalities must apply at least 20 days prior to the requested date in writing on Department approved forms to the Department for a Shellfish Transplant Permit.

The supervisor must keep accurate records on a Department approved form (Activity Log) and a copy of the Activity Log must be sent to the Department within 30 days of the activity.

- F. A municipality or regional program with a shellfish ordinance may not allow surveying, sampling, or harvesting of shellfish in areas closed by regulation of the Commissioner, except with express written authorization from the Commissioner.

In order to conduct a shellfish resource survey in an area closed by regulation of the Commissioner, a municipality must apply at least 20 days prior to the requested date in writing on a Department approved form to the Department for a Closed Area Survey Permit.

The supervisor must submit survey results to the Department within 30 days of the survey.

- DG. Once a Shellfish Transplant Permit or Closed Area Survey Permit permit is issued, a municipality or regional program must adhere to the following requirements while transplanting shellfish from, or surveying shellfish in, Growing Areas classified as restricted, conditionally restricted in the open status, or prohibited areas:

- (1) The transplanting or surveying must take place during daylight hours.
- (2) The transplanting or surveying may only take place on the day(s) designated in the permit unless the municipal or regional program secures written permission from the Department.
- (3) The transplanting or surveying may only take place under the supervision of the municipal shellfish warden, ~~Department staff member or Department authorized relay supervisor.~~
- (4) The transplant or survey supervisor shall have a copy of the permit with them at all times during the activity. Absence of a permit shall be prima facie evidence of a violation of this regulation.
- (5) The harvest crew must remain in the permitted source or survey area under immediate supervision of the municipal shellfish warden, ~~Department staff member or Department authorized relay supervisor~~ at all times.
- (6) Any harvesting violation shall nullify and void the permit. Any failure to comply with permit conditions shall be grounds for refusal of future permit applications until the Commissioner deems the municipality can meet the permit conditions.
- (7) Once a permit is issued, ~~t~~The permit holder must notify Marine Patrol the morning of the transplant or survey. The information required for Marine Patrol includes, but is not limited to, the following:

- (a) The name and contact information of the transplant or survey supervisor.
- (b) The date(s) and time(s) of the transplant or survey.
- (~~b~~c) The source area and the transplant area, or the survey area.
- (~~e~~d) Transplant permits only: the method and route of the transportation of seed to the transplant area.
- (~~e~~) Transplant permits only: the departure point from the harvest area and the point of arrival for the transplant area.

## 7.70 Intertidal mussel harvesting by drag or dredge

### 1. Municipal responsibilities

A municipality with an approved municipal shellfish conservation program may specify intertidal areas to be limited for mussel harvesting by drag in accordance with 12 M.R.S. §6671. The municipality's specified intertidal areas and procedures for enforcement shall be submitted to the Commissioner for approval as part of its Municipal Shellfish Conservation Ordinance. Once these specified areas are approved, they will be posted on the Department's website. The municipality shall provide sufficient notification to the public of any area limited for mussel harvesting by drag by publishing, advertising and/or posting in public places, an official municipal notice signed by the shellfish warden five (5) days prior to the initial implementation date. The method of notification must be approved by the Department prior to approval of areas limited for mussel harvesting by drag.

Upon receipt of a request for a recommendation regarding a permit, presented in accordance with Chapter 7.70(2), the municipality shall provide its recommendations to the applicant within 2430 days.

### 2. Intertidal mussel harvesting permits

Prior to issuance of an Intertidal Mussel Harvest permit in an approved, municipally defined area(s), the applicant shall submit their application to the Department who will forward it to the municipality. The completed permit application, and municipal recommendation must be provided to the Department by the respective party for permit consideration, in accordance with 12 M.R.S. §6671(3)(A)(5).

The application shall include the harvester's name, address, business phone, email address, fax number, vessel name and registration number, mussel harvesting license number, locations selected, start and end dates of harvest activity, targeted quantity of seed mussels and or market size product, and date of application.

### 3. Compliance

Any failure to comply with permit conditions shall be grounds for refusal of future permit applications until the Commissioner deems the applicant can meet the permit conditions.

## 7.80 Municipal aquaculture activities report

In accordance with 12 M.R.S. §6673(3) the municipality shall submit an annual report, on forms provided by the Department, to the Commissioner on its permitted aquaculture sites.

# Rule-Making Fact Sheet

(5 M.R.S., §8057-A)

AGENCY: Department of Marine Resources

NAME, ADDRESS, PHONE NUMBER OF AGENCY CONTACT PERSON:

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CHAPTER NUMBER AND RULE: Requirements for Municipalities Having Shellfish Conservation Programs

STATUTORY AUTHORITY: 12 M.R.S. §6671

DATE AND PLACE OF PUBLIC HEARING: February 12, 2024, 5:00 p.m., in-person at the Sorrento-Sullivan Rec Center, 1776 US-1 Sullivan, ME. February 13, 2024, 4:30 p.m. in-person at the Marquardt Building, Room 118, 32 Blossom Lane, Augusta or remotely via Microsoft Teams. Remote access information is posted to DMR's website under "Meetings."

COMMENT DEADLINE: February 23, 2024

PRINCIPAL REASON(S) OR PURPOSE FOR PROPOSING THIS RULE: [see §8057-A(1)(A)&(C)]

This rulemaking is proposed to modify and clarify the requirements of Municipal Shellfish Programs so that the Department of Marine Resources can consistently apply the same standards to all programs. These changes including amending current definition of "period of issuance" and providing a new definition for the effective license year. Additionally, regulations regarding holding and removing shellfish on and from Municipal Limited Purpose Aquaculture licenses (LPAs) sites held by Shellfish Committees have been developed. The process for requesting permission to complete a shellfish resource survey in a closed area and the requirements for such surveys have been defined. Finally, the length of the comment period for Shellfish Programs to provide recommendations on intertidal mussel dragging has been increased from 21 to 30 days.

IS MATERIAL INCORPORATED BY REFERENCE IN THE RULE? \_\_\_ YES \_\_\_  NO [§8056(1)(B)]

ANALYSIS AND EXPECTED OPERATION OF THE RULE: [see §8057-A(1)(B)&(D)]

This rule will establish new standards for Municipal Shellfish Programs that may require some municipalities to amend their shellfish ordinances for compliance. It establishes processes for certain activities (movement of shellfish off of municipally held limited purpose aquaculture licenses and municipal surveys in closed areas) that have not previously been defined.

BRIEF SUMMARY OF RELEVANT INFORMATION CONSIDERED DURING DEVELOPMENT OF THE RULE (including up to 3 primary sources relied upon) [see §§8057-A(1)(E) & 8063-B]

The development of the rule included the Department's experience reviewing municipal ordinances and proposed changes to license allocations, and consideration of Title 12 MRS §6073-A for exemptions to requirements regarding the time of taking or possessing, minimum or maximum length or other minimum or maximum size requirement for any marine organism cultivated on the LPA site. Input from a Regional Shellfish Program was considered for the change of the intertidal mussel drag permit application comment period from 21 to 30 days.

ESTIMATED FISCAL IMPACT OF THE RULE: [see §8057-A(1)(C)]

Enforcement of this rule will not require additional activity in this agency. Existing enforcement personnel will monitor compliance during their routine patrols.