

**NOTICE OF AGENCY RULE-MAKING ADOPTION**

**AGENCY:** Department of Marine Resources

**CHAPTER NUMBER AND TITLE:** Chapter 7 - Requirements for Municipalities having Shellfish Conservation Programs

**ADOPTED RULE NUMBER:**  
(LEAVE BLANK-ASSIGNED BY SECRETARY OF STATE)

**CONCISE SUMMARY:** This rule-making clarifies the existing requirements for municipalities having shellfish conservation programs by reorganizing sections to be more understandable and improving the wording of the regulation throughout the chapter. It also provides greater consistency throughout the chapter with regard to the establishment of various deadlines, using “days” throughout rather than “business days.” Finally, it amends the components of municipal shellfish management plans to be consistent with what the law allows.

**EFFECTIVE DATE:**  
(LEAVE BLANK-ASSIGNED BY SECRETARY OF STATE)

**AGENCY CONTACT PERSON:** Amanda Ellis (207) 624-6573  
**AGENCY NAME:** Department of Marine Resources  
**ADDRESS:** 21 State House Station  
 Augusta, Maine 04333  
**WEB SITE:** <http://www.maine.gov/dmr/rulemaking/>  
**E-MAIL:** [dmr.rulemaking@maine.gov](mailto:dmr.rulemaking@maine.gov)  
**TELEPHONE:** (207) 624-6573  
**FAX:** (207) 624-6024  
**TTY:** (207) 633-9500 (Deaf/Hard of Hearing)

*Please approve bottom portion of this form and assign appropriate MFASIS number.*

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010	13A	1120	10	4946	regulations

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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 any twelve month period designated by the municipality, unless a municipality chooses to limit the number of licenses it issues in which case it shall mean the first 90 days during which a municipality issues shellfish harvest licenses each calendar year.

#### 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, ~~shellfish taken, establishing a minimum size where a state minimum does not exist or establishing a more conservative minimum size~~, 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 Departments' 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 using a Department-approved form.

#### ~~2. Shellfish Resource Survey Requirement~~

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 also conduct resource surveys in lieu of or in conjunction with the municipalities.
3. Enforcing ~~any~~ the municipal shellfish conservation ordinance by ~~the~~ a Department certified Shellfish Warden including but not limited to ~~these 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 ~~Annual-Municipal Shellfish Management Plan Review, a report~~ 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 production records ~~or summaries of municipal wardens' activities for municipally managed areas, and funds requested for the coming fiscal year any other information the Department deems necessary.~~

### 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.



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 ~~business~~ 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 Permit Requirements

A. A municipality or regional program with a Municipal Shellfish Conservation Ordinance must have a permit from the Department to possess ~~undersized shellfish 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 ~~40~~ 20 ~~business~~ 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 days of the activity.

B. Shellfish ~~taken~~ moved from Growing Areas classified as restricted, conditionally restricted in the open status or prohibited must be planted to areas closed by the Department for specified amounts of time. Only seed may be transferred from Growing Areas classified as prohibited. If product larger than seed is proposed to be transplanted by a municipality ~~for relay purposes~~ from areas classified as restricted or conditionally restricted in the open status, the Department ~~will~~ 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 ~~their~~ the municipality's ability to control restricted area ~~relay 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 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. Municipalities must apply at least 30 days prior to the requested date, in writing, to the Department for a Shellfish Transplant Permit using a Department approved form.~~

~~E.~~ D. Once a permit is issued, a municipality or regional program must adhere to the following requirements while transplanting shellfish from Growing Areas classified as restricted, conditionally restricted in the open status, or prohibited areas:

- (1) The transplanting must take place during daylight hours.
- (2) The transplanting 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 may only take place under the supervision of the municipal shellfish warden, Department staff member or Department authorized relay supervisor (~~Chapter 21~~).
- (4) The transplant 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 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 10 days of the activity. The permit holder must maintain a copy for two years and make it available to the Department upon request.~~
- (~~6~~ 5) The harvest crew must remain in the permitted source area under immediate supervision of the municipal shellfish warden, Department staff member or Department authorized relay supervisor at all times.
- (~~7~~ 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.
- (~~6~~ 7) Once a permit is issued, the permit holder must notify Marine Patrol the morning of the transplant. The information required for Marine Patrol includes, but is not limited to, the following:
  - (a) The name and contact information of the transplant supervisor.
  - (b) The source area and the transplant area
  - (c) The method and route of the transportation of seed to the transplant area.
  - (d) 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 21 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 request to, and consult with the municipality, and shall obtain the municipality's recommendation in writing application to the Department who will forward it to the municipality. The completed permit application, (~~provided to the applicant by the Department~~) and municipal recommendation must be provided to the Department by the applicant 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, ~~and a copy of the municipality's recommendations.~~

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:

Amanda Ellis (207-624-6573) , Department of Marine Resources, 21 State House Station, Augusta, Maine 04333-0021 E-mail: [Amanda.Ellis@maine.gov](mailto:Amanda.Ellis@maine.gov) Web address: <http://www.maine.gov/dmr/rulemaking/>

CHAPTER NUMBER AND RULE: Chapter 7

STATUTORY AUTHORITY: 12 MRS §6671

DATE AND PLACE OF PUBLIC HEARING:

June 25, 2018 1:30 PM DMR Offices, Marquardt Building, 32 Blossom Lane, Augusta, Maine

COMMENT DEADLINE: July 6, 2018

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

These changes are proposed for the purpose of achieving greater clarity and consistency in the application of these requirements.

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

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

This rule does not make substantive changes to the chapter but is intended to reduce confusion regarding how the requirements are implemented.

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]

Staff within the Municipal Management Program in the Bureau of Public Health provided input on the necessary changes.

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

No fiscal impact is anticipated.

***FOR EXISTING RULES WITH FISCAL IMPACT OF \$1 MILLION OR MORE, ALSO INCLUDE:***

*ECONOMIC IMPACT, WHETHER OR NOT QUANTIFIABLE IN MONETARY TERMS:*

[*see* §8057-A(2)(A)]

*INDIVIDUALS, MAJOR INTEREST GROUPS AND TYPES OF BUSINESSES AFFECTED AND HOW THEY WILL BE AFFECTED:* [*see* §8057-A(2)(B)]

*BENEFITS OF THE RULE:* [*see* §8057-A(2)(C)]



## Basis Statement

This rule-making clarifies the existing requirements for municipalities having shellfish conservation programs by reorganizing sections to be more understandable and improving the wording of the regulation throughout the chapter. It also provides greater consistency throughout the chapter with regard to the establishment of various deadlines, using “days” throughout rather than “business days.” Finally, it amends the components of municipal shellfish management plans to be consistent with what the law allows.

In response to public comment the Department has modified the following:

- In section 7.30(4) pertaining to annual reporting, the Department removed the proposed language “any other information the Department deems necessary.”

## Summary of Comments:

Notice of this proposed rulemaking appeared on June 6, 2018 in the five major daily newspapers as published by the Secretary of State. On June 7, 2018, the rule was posted on the DMR website, and electronic messages were sent to individuals and other stakeholders who subscribe to DMR notices. Public hearings were advertised in compliance with the procedures outlined in the Maine Administrative Procedures Act and were held on June 25, 2018 at 1:30pm in the DMR conference room, Augusta. The comment period closed on July 6, 2018.

Attendees at June 25, 2018 hearing

Name	Affiliation
Bailey Bowden	Penobscot
Kathleen Billings	Stonington
Judy Rolfe	Addison
Deirdre Gilbert, Kohl Kanwit, Denis-Marc Nault, and Amanda Ellis	DMR Staff

Public Hearing Comments:

### Bailey Bowden, Penobscot

My name is Bailey Bowden and I am the Chair of the Town of Penobscot Shellfish Conservation Committee. I would like to address you in that capacity, but with the short notice given by DMR for this hearing, we were not able to have a meeting to discuss this matter. Our meeting will be tomorrow night and I suspect that written comment will be sent. I oppose several proposed changes that will limit the ability of the municipality to manage their shellfish as mandated by the Legislature. Management opportunities are being removed or limited and cookie cutter policy is being forced upon the municipality. At one time, DMR understood and respected the municipalities right to manage their local resources and that the flats vary from town to town. The Department lacks the resources, both physical and monetary, to properly manage Maine's shellfish. That is a huge reason why this program still exists. I live between two towns under State management and I can assure you - there is NO management. There is a hands off approach which does not support a sustainable fishery. DMR staff have not done any surveys, seeding, or flat enhancement to the shores of Brooksville or Castine. Where is the management plan for the flats of these towns?

- 7.20 B Shellfish Management Plan - municipalities will no longer be allowed to set minimum size limits on razor, hen, quahog, or oyster. The municipality is allowed to manage these shellfish under statute. This rule undermines the intent of the Legislature and reduces local management options.
- 7.30 2 Management Responsibilities - municipalities may be required to conduct resource surveys ...this will cause an economic impact as the Department of Labor has stated that uncompensated labor is illegal ( conservation work ).
- 7.50 2A Municipal Shellfish Transplant Permit Requirements - this rule mandates that a permit be granted by DMR to possess seed whether wild or hatchery raised. Rule 2.95 A4 allows aquaculturists to possess the same seed without a permit. Are clambers criminals? Since when are individual people are given more rights than a Municipal Program? This is another rule aimed at abolishing town programs.
- 7.50 2B 1&2 This rule requires that a municipal program have a warden that has undergone the 100 hour CJA course and be employed by the municipality for 20 hours per week in order to transplant seed. This puts towns with small programs at a disadvantage to wealthier towns, prevents renting a warden, and removes a management option. I do not see how DMR can prevent transplanting legal size clams that have been harvested legally from an open area. The clams belong to the harvester to do what he pleases with. I believe that Penobscot is the only Town to ever transplant legal size clams and these rules will prevent us from doing so again. Is this retribution for standing up to the Department and seeking a better way to manage our local resources ?
- 7.50 2D 7 requires Marine Patrol to be notified the morning of any conservation activity. Most towns do their work on the weekends. A phone call at 430 AM on Saturday goes to the State Police. This rule used to be 24 hour notice. Contact should be made with Patrol not the State Police. Patrol should be given the opportunity to ask questions about the project.
- 7.70 2 Intertidal Mussel Harvesting Permits - this rule eliminates the opportunity for the municipality to comment, recommend, or consult with the dragger. Less communication is never a good thing.

### **Kathleen Billings, Stonington**

My name is Kathleen Billings, I am the Town Manager of Stonington Maine and I am deeply concerned about the lack of transparency and this process of rule-making now. It used to be any proposals went to each respective advisory council. I have been watching the agendas and attended the last SHAC meeting. In no way did this present proposal on Chapter 7 and Chapter 14 come up before the SHAC for public dialog and comments. Why? What happened to the DMR? It used to be at least more open and responsive! This is not right! I want to know who is proposing these rule changes and why! These are clearly changing the intent of municipal shellfish programs, not language clean up. It is taking away the partnership of the towns with the DMR and the authority to manage our town flats as we see necessary, and what we put our hard-earned tax dollars and fees into. Think of the thousands of clam licenses, the fees for enforcement, the jobs the shellfish program provides. These are job killing rules and the high hierarchy of the DMR is misguiding the industry with the lack of transparency and now proposing job killing rules to break the spirit of the diggers, towns and tax payers who thrive on this grass roots managed fishery for our local economy. I am appalled at this process being rolled out, the loss of our intertidal zone rights, lack of transparency in rule making and the loss of confidence I have now with the DMR in regards to the resources. The claim of no fiscal impacts is not true. Telling towns how much enforcement hours or MCJA requirements they need to do is fiscal impact. Taking away management tools of size management is taking away the ability for towns to manage the resource in 7.20B is counterproductive. What is the shellfish management tool or plan going ahead for the DMR to manage the resource? We need to see the plan going forward if you are boldly proposing these regulation changes! Making towns do surveys, having the ability to pull programs from towns if they can't in 7.30-2 being proposed, and an economic hardship for towns with the 10% requirement. If you impose these gross regulations and towns have to surrender their co management programs, who is the DMR going to do surveys. Is this like the State-owned flats you have now, where is your plan for these

counterproductive proposals. The unresolved MDOL issue with labor on conservation requirements is still not clear. On 7.40 1 & 2 language proposed is not clear on the rates, and who and what makes up a qualified non-resident. It appears to be something other than what the towns are able to do as being proposed by the poorly written and confusing language. For section 7.50 A & B are unclear and impose huge fiscal impacts to the town for increasing hours for enforcement. We can't always go to a town meeting so fast to re-budget for this. What is the matter with you folks, after working with the towns for 60 years, where is your thinking. We have an annual budget once a year, being forced to a special town meeting takes time and money! As for section 7.30 I am against mussel dragging on town flats, it kills our fishery and with our fees going to mussel survey's I don't agree with that also. The mussel industry died because the DMR didn't manage it right, now you want survey's but do mussel dragging without consulting the towns who are working on keeping productive flats productive is wrong and stripping more of our authority. Clearly, the DMR needs to rethink these rules, change the intertidal rules just passed on new "definitions" of intertidal ownership and enforcement back to what they were. Same thing, unclear enforcement issues are a fiscal impact to us, a huge one! These proposed regulations should not pass this process. Who and what towns were reached out to for these regulations changes? I am respectfully asking for in this letter for a FOAA request for the last year of Kohl Kanwit's emails pertaining to Chapter 7 rules. I am opposed to it, I know other towns are and my Selectmen are opposed to them.

**Department Response to FOAA Request:** The Department responded to Ms. Billings' FOAA request on July 2, 2018. Ms. Billings acknowledged receipt of the requested materials on July 2, 2018.

### **Written Comments**

Comment period closed on July 6, 2018

#### **Rebecca Graham, Maine Municipal Association, submitted via email, June 11, 2018**

Thank you for the opportunity to comment on the proposed rules to Chapter 7, Requirements for Municipalities having Shellfish Conservation Programs. Overall, municipal officials are grateful for the Department of Marine Resources' interest in clarifying current regulations and creating greater consistency with regard to reporting-related deadlines. To that end, municipal officials believe two additional clarifications are warranted. First, municipal officials are concerned with the proposed reporting standards that require municipal officials to provide "any other information the Department deems necessary." The management responsibilities under section 7.30 § 4 previously benefitted from very specific reporting requirements, which helped municipal officials understand exactly what communities needed to track and report as part of their annual review. If the goal of the proposed rule is to create clarity, municipal officials would benefit from to having advanced understanding of future reporting requirements, as the rest of the section provides, and some consideration and input regarding the administrative burden that may result should the Department wish to expand its reporting needs. To that end, municipal officials suggest striking this language, or placing additional language to create a collaborative process for expanding additional reporting. Second, municipal officials are concerned with the addition of the term "supervisor" and the responsibility assigned to this individual under 7.70 § 2-A. As proposed, the "supervisor" is directed to keep "accurate records on Department approved form and a copy of the Activity Log to be sent within 20 days of the activity". The remaining language in this sections refers only to the "municipality" or the "warden", making the use of term "supervisor" in this section confusing. With respect to this proposed change, is it the intent of the Department to assign this recordkeeping task to the municipal official directed to enforce a municipality's shellfish conservation ordinance? Or, does the Department intend to assign this duty to the municipal official who supervises the person responsible for enforcing the ordinance? The Maine Municipal Association and municipal officials appreciate the Department's effort simplify how these shellfish conservation program

requirements will be implemented. We hope that clarifying the issues raised above will aid the Department in its efforts to create clear and unambiguous regulation of this economically vital local industry.

**Paul Bowen, Penobscot Board of Selectmen, submitted via mail, June 21, 2018**

It has come to the attention of the Penobscot Selectboard that your Department is in the early stages of promulgating rules that may alter the authority of local Shellfish Committees to successfully manage these resources. We would prefer that this not be the case. In my 25+ years on the Penobscot Selectboard I have noticed a disturbing trend among state agencies and in some cases the Legislature as well, to gradually erode the traditional state/local partnership that we have all enjoyed for generations. This partnership is critical for agencies such as yours, since so much local knowledge is key to understanding the diversity of marine life in our estuaries. Our Penobscot Shellfish Committee and its Chairman, Bailey Bowden, have worked tirelessly to protect and grow the shellfish resources in our care, and have done so completely without compensation. Any proposed rule that would reduce their authority to do this work is completely unacceptable. The Penobscot Selectboard stands opposed to any such rules. We wish to thank you for hearing our concerns and we stand ready to assist you in any way possible as these rules are considered.

**Bar Harbor Marine Resource Committee, submitted via email, June 29, 2018**

Our committee discussed the proposed rule changes to Chapter 7 at our recent monthly meeting on June 20, 2018. We agreed at that meeting to summarize some of our thoughts, circulate the document among ourselves after the meeting, and forward it as a comment.

Overall, we thought most of the changes in the document matched the description, that is, they were grammatical changes that increased the clarity of the document. However, in a couple of places we felt that the changes were substantive, and wanted to point out those places and the general concern they raise for us. For example in 7.20.B we see no reason to restrict the ability of towns to set more restrictive limits on shellfish harvestable sizes. For example, towns may feel that some populations are better able to self-seed if individuals are allowed to grow larger before harvesting, and unless there is evidence to the contrary we see no reason for the state to restrict that ability. We see no benefit to adding the restrictive language here, the current regulations do not allow towns to decrease minimum sizes, which would be our main concern with any local size changes.

In 7.30.4 there was some concern over the very general language added to the end, ‘any other information the Department deems necessary’, not because it allows for flexibility (which we are in favor of), but that a town can have its ordinance revoked if it fails to fulfill the Shellfish Management Plan objectives (7.35), which with this new language can be modified by the department at any time.

In 7.40.1 we thought that the language should be clarified – currently it says that ‘Licenses unsold during the period of issuance shall be issued at the original allocated fee in each category regardless of residency’. We believe this means that these licenses would be sold at the less expensive resident rate, but it is unclear to us, and think just stating that they will be sold at the residential rate (or whatever standard you are following) would clarify this sentence.

In 7.50.2.A we thought that the change from 2 weeks (10 business days) to approximately 3 weeks (20 days) was unfortunate and should be revised. This longer period with no flexibility restricts a local town’s ability to take advantage of opportunistic activities, such as the Downeast Institute having extra seed that they are offering to harvesters to outplant.

Our more general concern is that recent rule changes appear to be both limiting the scope of responsibility of town co-management and producing more rigid rules across all towns. We believe that both of these general changes reduce the ability of co-management to be a successful tool in managing these common-pool resources. We strongly believe in both the theory and practice of local co-management in the soft-shelled clam fishery, and believe that the interaction of the local committee with commercial harvesters, DMR officials, and local schools to help with conservation and management work all have positive outcomes for both the community and our shared marine resources. Although we are in favor of increasing clarity within the rules, we see the changes to increase consistency in the rules having the potential to be counterproductive, by restricting local towns from being able to adapt their ordinance to local conditions. We see a much higher standard of evidence necessary for any proposed changes that decrease the ability of local towns to regulate their shellfish fishery.

**Stonington Board of Selectman, submitted via email, July 3, 2018**

It has come to our attention regulation changes are being proposed for Chapter 7 and Chapter 9 of the shellfish management program. We are opposed to changes to the program as outlined in this letter. It appears from the various sections towns participating in this program are losing their ability to manage our resources. As proposed these draft regulations were never brought for or reviewed by the SHAC council before heading to rule-making except for a brief conversation about taking undersize oysters and moving them into private leases. Two SHAC meetings went by with no actual rulemaking draft in its entirety was presented for dialog and comment as changes to 6671 & other sections. This is top down management, no co-management as it should be for intertidal resources. If this was lobster, this would never happen, but it appears internally DMR or a few in other towns can propose changes that can have drastic effects on other town programs. Also, it states there is no fiscal impact. Not true for several of these sections of changes being proposed such as - Section 7.30-2, for survey work, we don't have the capacity for doing the required amount of flats if you choose to make us do it. If some programs have to have wardens with MCJA (over and above the DMR current warden requirements now) certifications, or go to 20 hours, in 7.50- 28 it is a fiscal impact. A huge one for some of us if current wardens cannot patrol due to the proposed requirements for relay of seed in closed or restricted areas. One of the reasons we were granting these resource management rights was because the DMR or Sea and Shore back then did not have the money or resources to be able to do it. You still don't or if you do, present the plan going forward to fulfil the draft rulemaking proposal as it stands now. On 7.20 B- changing the size requirements we object to. It takes away a management tool for us to get another year class if we choose to go to a larger size. On 7.70-2, we object to the towns not being able to comment on mussel harvesting on flats that you are crossing us off the list on. Why? It takes away our rights to be able to have a say whether good productive flats get dragged up damaging the clam resources we have. We went through this with our reciprocal ordinance with Deer Isle, mussels would come into Pickering & Greenlaw coves and drag and kill good productive flats. There are no mussels in this area and many others because the mussels either have died off, were over harvested or so much seed was already over dragged off the coves the resource collapsed as well as other species until almost at times it is too late.

Chapter 9, with the oyster's changes being proposed. There should be more dialog with all the towns. As it is written currently it appears it can easier to have the wild clam fishery taken over by oyster farming or seeding it over to over take soft shell clams. With LD 15 I 9 and the intertidal zone definition changes will make it impossible to define at any given time who can harvest what with the tide changes and is causing enforcement problems that some Shellfish Wardens and Towns will be dealing with.

It has come to our attention as well, that very few if any clam committees were informed or shown the proposed rule making changes before June 6 release of this to go to hearing. Even in the Chapter 7 changes, on the Rule Making Fact Sheet under Relevant Information only staff and Bureau of Public Health only had input into this. None from Patrol, none from Town Programs or SHAC. This is wrong and is a bad way to go not to inform the industry of these many critical changes.

Another item we have become aware of in trying to collect information on how many towns participate, how much town budgets contribute to the health and sustainability of the municipal clam programs or how many enforcement hours are done, you can't answer these questions because you do not compile any total summary for the public to review. What does our license fees go for now? This should be a tool for those in the industry and the Towns, to be able to have access to and use going forward. You used to do it, but now for almost 15 years nobody does anything although it is a requirement or our programs are pulled if we don't turn it in. This is a problem and we strongly suggest since Deer Isle and Stonington is a huge area of clam resources and license and jobs we depend on.

**Judy Rolfe, Town of Addison Shellfish Committee, submitted via email, July 6, 2018**

The Town of Addison, Maine would like to comment on the proposed changes to Chapters 7 and 14 of DMR Rule. Municipalities and DMR have enjoyed a long history of co-management of the shellfish resource and DMR Rule Making has always allowed for a certain amount of flexibility to acknowledge that best management practices may vary widely along the coast of Maine. Several proposed changes to current rule will limit the ability of the municipality to manage their shellfish resource. With constantly changing environmental conditions, the Municipality needs more flexibility to be able to adapt to these changes in a timely manner, not less. The fact this was not brought before the SHAC is concerning. No outside involvement in planning of the proposed rule changes is concerning.

- 7.20 B. Shellfish management plan – municipalities will no longer be allowed to set minimum size limits on razor, hen, quahog, or oyster. This option was granted in 2014 and is now being taken away – why?
- 7.30 2 Management Responsibilities – municipalities may be required to conduct resource surveys...this will cause a financial impact as the Department of Labor has stated that uncompensated labor is illegal (conservation work). Municipalities may need to hire addition labor to complete this task which is a financial impact to the municipality. With the wording of “may” this is totally at the whim of DMR to request from any town they choose.
- 7.50 2A Municipal Shellfish Transplant Permit Requirements – this rule mandates that a permit must be granted by DMR to possess seed whether wild or hatchery raised. Rule 2.95 A4 allows aqua culturists to possess the same seed without a permit. Are clam diggers criminals? Since when are individual people are given more rights than a Municipal Program?
- 7.50 2B 1&2 This rule requires that a municipal program have a warden that has undergone the 100-hour CJA course and be employed by the municipality for 20 hours per week in order to transplant shellfish taken from an area classified as “conditionally restricted in the open status”, and that the Department “may”, not will, issue a permit for the activity. This puts towns with small programs at a disadvantage to wealthier towns, prevents renting a warden, and removes a management option.
- 7.50 2D 7 requires Marine Patrol to be notified the morning of any conservation activity. Most towns do their work on the weekends. A phone call at 430 AM on Saturday goes to the State Police. This rule used to be 24-hour notice. Contact should be made with Patrol not the State Police. Patrol should be given the opportunity to ask questions about the project.
- 7.70 2 Intertidal Mussel Harvesting Permits – this rule eliminates the opportunity for the municipality to comment, recommend, or consult with the dragger. Less communication is never a good thing. As stated in the Public Hearing it relieves conflicts in our opinion this creates more. Taking away the control that Towns are notified first and basing this action on what has happened in some Towns. Another case of taking away Municipal Control due to actions of other Towns. If other Towns don't follow the rules of timelines, then penalize them not penalize Towns that do follow the rules.

**We as the Town of Addison Shellfish Committee Oppose any of these changes being done. The complete disregard for the voices of Municipal Shellfish Harvesters that these Rules affect. The very vague summary of these proposed rule changes giving people the illusion that this is only about clarifying wording from business days to days is misleading and dishonest. Many committees have seen the summary and don't read any further thinking it is just about what is in the summary**

**as was evident by the attendance at the Public Hearing and my talking with Committees after the Hearing. Any Proposed Rule Changes should go through SHAC and allow more than 17 days for committees to talk with their members. Any changes affect the Harvesters and Municipalities. Our Ordinance changes are gone over and over with DMR before they can be approved. Show the Municipalities the same consideration. Each Municipality is different throughout the State just as each State Agency is different.**

**James Saltonstall, riparian landowner on the Bagaduce River, submitted via email, July 6, 2018**

*The comment was also signed by the following: Tom and Karen Adamo, Bundy Boit, Peter and Lucia Gill Case, John and Joan Freeman, Nancy Gill, Ruth Modisette, Caren Plank, Ann Sterling, Andrew Abrams, Tom Stewart and Trina Dykstra.*

In Section 7.20 1B, the municipality's authority to set minimum size standards for shellfish has been removed. The Legislature has deemed it the responsibility of the municipality and the State to co-manage.

In Section 7.50, #2, items B1 and B2, you allow municipalities to appoint (at their expense) a "warden" to oversee seed transplant activities. However, requiring 100 hours of training and stipulating that these wardens be paid as Town staff for at least 20 hours per week is a formula that the city of Augusta may be able to afford, but the town of Penobscot could never afford given its population of 1,500.

A General Comment: The tone and language used in these proposals does nothing to encourage a supportive co-management relationship between the municipality and DMR. This approach leaves the impression DMR does not trust the municipalities to set and oversee its own regulations. We are worried that local control is completely left out of these proposed changes to the regulations. Home rule is what most towns want. We know best what will work best in our towns. What do you do to make sure that there is some input by varied communities in these regulations?

#### **Department Response to Comments:**

**Note:** During the rule-making process the Department also proposed changes to Chapter 14, which pertains to oysters. Some commenters included Chapter 14 comments with Chapter 7. Comments specific to Chapter 14 are addressed in rule-making documents associated with that filing. In addition, some commenters mistakenly referenced Chapter 9 instead of Chapter 14. Any references to Chapter 9 were included in Chapter 14 filings. Please reference the Chapter 14 rule-making adoption filing for the Department's response to comments that were specific to that proposal.

#### **Transparency of Rule-Making Process:**

Some commenters felt that the rule-making process was not transparent and that the Shellfish Advisory Council (SHAC) did not have the opportunity to provide feedback. This rule was promulgated in accordance with applicable portions of the Maine Administrative Procedure Act (MAPA) 5 M.R.S. § 8001-11008. MAPA establishes a uniform, comprehensive set of procedures governing the administrative actions of state agencies, including rule-making. This includes publishing notice of the proposed rule and providing an opportunity for feedback via a comment period and public hearing. In this instance, notice of the rule-making proposal was published on June 6, 2018, in the five major newspapers and the Secretary of State's notice of rulemaking column. On June 7, 2018, the Department also posted the proposed rule to its website and sent electronic notice to industry and other stakeholders via email listserv. A public hearing was held on June 25, 2018, and the comment period closed on July 6, 2018. The rulemaking process is an appropriate procedure by which to obtain public input from stakeholders, including the advice of SHAC members should they wish to provide comment on the proposal. While the Department may discuss rule-making proposals in concept with Advisory Councils prior to going to rule-making, it is

not typical to share actual rule-making language until the APA process begins. Further, these changes were not considered substantive in nature.

#### **Concerns with the Concise Summary:**

The intent of the concise summary is to convey a brief overview of the proposed changes. The Department provided an accurate concise summary noting that the proposed changes clarified existing requirements for municipalities and that it amended the components of municipal shellfish management plans to comply with what the law allows. The concise summary is followed by the text of the existing rule with proposed changes noted by a ~~striketrough~~ or underline. Any text containing a ~~striketrough~~ would be removed from the regulation, while any underlined text would be added to the regulation. Existing text that does not have a ~~striketrough~~ or underline remains unchanged. While individuals may choose to only consult the concise summary, the rule-making packet contains all changes.

#### **Municipal Licensing of Shellfish Harvesters-Unsold Licenses:**

Some commenters wanted clarification regarding the sale of unsold licenses after the period of issuance. After the period of issuance, any unsold licenses need to be issued in accordance with the original allocated fee in each category regardless of residency. Therefore, it would be possible for a resident to pay a nonresident license fee. Unsold licenses need to be sold pursuant to the original category fee, so that the Department has an accounting of license allocations by category.

#### **Limiting the Minimum Size of Shellfish:**

Some commenters were concerned that the Department was revoking, without cause, the authority of municipalities to establish minimum sizes for shellfish. The intent of the proposed change is not to limit the authority of municipalities, but to comply with the existing statutory requirements that govern shellfish management programs. Pursuant to 12 M.R.S. § 6671 municipalities are delegated specific authority concerning shellfish management. In this instance, 12 M.R.S. § 6671(3)(B) specifies that a shellfish conservation ordinance must limit the size of soft-shell clams. It does not give municipalities the authority to limit the size of shellfish. Prior to the proposed changes, Department regulations allowed, in error, municipalities to establish a minimum size for shellfish where a state minimum did not exist, or to establish a more conservative minimum size. This section of the regulation did not comply with the statute, which only grants authority to limit the size of soft-shell clams. Therefore, the Department is removing language that had previously allowed municipalities to establish a minimum size for shellfish. This change corrects the error and ensures that the regulation complies with the statutory authority set forth in 12 M.R.S. § 6671. The Department cannot change a statute through administrative rule-making, nor can the Department grant an authority in regulation that does not exist in statute. The ability of municipalities to establish a minimum size for shellfish where a state minimum does not exist, or to establish a more conservative minimum size would require a legislative change to 12 M.R.S. § 6671.

#### **Intertidal Mussel Harvesting Permits:**

Commenters felt the Department was eliminating the ability of the municipality to submit recommendations on intertidal mussel harvest permits. However, the Department is proposing a change to the request process. As proposed, applicant's will submit their request to the Department, who will forward the request to the municipality. This is to ensure intertidal harvesting requests are processed in accordance with applicable timelines. The Department is not revoking the ability of a municipality to submit recommendations on intertidal mussel harvesting permits. The municipality retains the ability to provide recommendations on the application and consult with the respective party.

#### **Fiscal Impact of the Rule-Municipal Shellfish Surveys:**

There appears to be some confusion regarding proposed changes and the existing regulations. Some commenters felt that the proposed change to 7.30(2) will create a fiscal burden on the municipality by requiring it to conduct a shellfish resource survey. However, the proposed change is an edit that strikes a



section header for stylistic consistency. Therefore, the proposed change is not substantive and does not present a fiscal impact to municipalities. In 2014, the Department substantively modified 7.30(2) to include the existing provisions regarding municipal resource surveys. Therefore, the requirements of 7.30 are consistent with what has been in place since 2014.

**Transplant Permit Requirements:**

There appears to be some confusion regarding proposed changes and existing regulations. The proposed changes to section 7.50(2) clarify existing regulations and do not represent substantive changes to the transplant permit requirements. Section 7.50(2)(A) clarifies that seed regardless of source (wild or hatchery) requires a permit. Municipalities and regional programs need a transplant permit so that they do not violate provisions set forth in 12 M.R.S. § 6681, which specifies specific size limits for soft-shell clams. The permit provides for the possession of undersized shellfish for reseeding shellfish areas. Some commenters noted that these permitting requirements do not apply to shellfish aquaculture. With regards to different permit requirements, each program the Department manages is subject to specific permitting and licensing requirements. These requirements are established by statute and regulation, which reflect, in part, the unique system of management specific to a resource or program.

**Change in Deadlines-“Business Days” to “Days:”**

Some commenters were concerned that the proposed change from business days to days would restrict a town’s flexibility. However, the Department needs adequate time to review and issue permit requests. In addition, timelines need to be applied consistently across management programs. The change from business days to days will help the Department administer programs consistently and ensure timely permit review and issuance.

**Clarification of the Term Supervisor:**

One commenter wanted clarity regarding use of the term “supervisor” contained in section 7.50(2)(A). Supervisor is meant to designate someone other than a warden (i.e. Shellfish Committee Chair), who oversees transplant activities that do not involve restricted area product. The intent is to provide flexibility in transplant oversight for classifications other than restricted.

**Warden Transplant Permit Requirements:**

Some commenters took issue with the warden training, certification, and employment requirements specified in 7.50(2)(B)(1) and (2). These existing requirements are not changing. The proposal clarifies that a warden, who satisfies the criteria, would be required if the municipality wanted to transplant shellfish *larger than seed* from areas classified as restricted.

**Notifying Marine Patrol:**

There appears to be some confusion regarding proposed changes and existing regulations. The Department is proposing an edit to the numbering in section 7.50 and is not proposing any substantive changes to existing Marine Patrol notification requirements.

**Information on Town Participation:**

One commenter noted that they could not find information related to town participation. The Department tracks ordinances, licenses, and permits issued. The relevant information can be found here: <https://www.maine.gov/dmr/shellfish-sanitation-management/programs/municipal/index.html>

**Tone and Language of the Proposed Rule:**

One commenter was concerned that the tone and language of the rule did not foster co-management. The intent of a regulation is to convey applicable laws, not emotion or attitude. Regulations are constructed to be clear, concise, and understandable.