



# The Commonwealth of Massachusetts

## Division of Marine Fisheries

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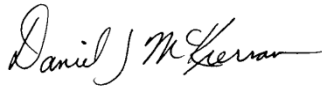
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### MEMORANDUM

TO: Marine Fisheries Advisory Commission (MFAC)  
Massachusetts Shellfish Advisory Panel (SAP)

FROM: Daniel J. McKiernan, DMF Director 

DATE: November 9, 2023

SUBJECT: **Status of Surf Clam Dredging Activities Subject to Municipal Control Under the Wetlands Protection Act**

#### Introduction

In 2007, the Town of Provincetown, through its Conservation Commission (“ConCom”) promulgated regulations prohibiting hydraulic dredging for surf clams pursuant to its authority under the Wetlands Protection Act (G.L. c. 131, §40). Since that time, I have been involved in internal and external discussions concerning the ongoing challenges where state regulated commercial fishing activities—particularly hydraulic surf clam dredge fishing—are and may be constrained by the Wetlands Protection Act (WPA) and local ConComs. This memorandum serves to provide the SAP and MFAC with background information on the management of surf clams in Massachusetts; an overview of the application of the WPA to commercial fisheries; an update on a Notice of Intent<sup>1</sup> (NOI) filed by a DMF-permitted surf clam dredge vessel to fish in Provincetown waters in 2022; as well as my thoughts on how to move forward.

#### Background on State Management of Surf Clam Fishery

State law (G.L. c. 130) establishes an extensive shellfish management program involving both state and local authorities. Under G.L. c. 130, §52 municipalities serve as the primary management authority for most shellfish fisheries (“home rule”). Home rule allows for each town and city to craft a shellfish management program that best reflects the character of the community and suits the community’s shellfish resources and fishing interests. The state’s role is principally focused on shellfish growing area classification, public health, veterinary health, and technical assistance.

In 1982, the Massachusetts legislature amended G.L. c. 130, §52<sup>2</sup> to constrain home rule over the management of commercial surf clam (or sea clam) and ocean quahog fisheries. Instead, management

<sup>1</sup> A Notice of Intent is submitted by an applicant who seeks permission to dredge, fill, or alter a wetland. The Notice of Intent Application provides the Conservation Commission and MassDEP with a complete and accurate description of the: (1) site including the type and boundaries of resource areas under the Wetlands Protection Act, and (2) proposed work including all measures and designs proposed to meet the performance standards described in the Wetlands Protection Act Regulations, 310 CMR10.00, for each applicable resource area.

<sup>2</sup> G.L. c. 130, §52 provides, in relevant part, “For the purposes of this section and section fifty-four, the term shellfish shall not include the commercial harvest of those species known as sea clams (*Spilosa solidissima*) and ocean quahogs (*Artica islandica*); provided however, the director may authorize the commercial management of sea clams and ocean quahogs by regional management of cities and towns, if in his opinion regional management will be in the best interest of the Commonwealth.

authority over these shellfish species was bestowed on DMF and its MFAC<sup>3</sup>, with an allowance for municipal involvement through the development of regional management plans among municipalities approved by DMF. This action was taken in response to the perceived negative impacts of municipalities developing discrete commercial surf clam and ocean quahog management programs. The commercial surf clam and ocean quahog fishery is conducted predominantly by industrial scale vessels using hydraulic dredge gear and moving from area to area to exploit the available resource. The balkanized management approach—with each municipality potentially regulating and permitting the fishing activity—made it unduly onerous to participate in this mobile commercial fishery occurring state-wide and in adjacent federal waters. The legislature preferred a more streamlined approach and determined it was in the best interest of the Commonwealth to provide management authority over the commercial surf clam and ocean quahog fishery to DMF to allow for a state-wide management program.

Consequently, in the early 1980s DMF and the MFAC developed and implemented new commercial surf clam and ocean quahog management regulations (322 CMR 6.08) and established regulated fishery permit endorsements for the use of surf clam and ocean quahog dredge gear (both hydraulic and dry dredges)<sup>4</sup>. These regulations focus on size and catch limits for surf clams and ocean quahogs; constraints on contaminated harvest of surf clams and ocean quahogs; restrictions on the use of surf clam and ocean quahog dredge gear; and time area closures affecting the use of dredge fishing gear to ameliorate user group conflicts and environmental concerns, including closures in some nearshore waters that protect areas where eel grass and juvenile fish habitat may occur<sup>5</sup>. These regulations have been amended over time on an as-needed basis to address emerging management challenges.

### **Application of Wetlands Protection Act to Commercial Fisheries**

Under current case law interpreting the WPA, the state's Department of Environmental Protection (MassDEP) or local ConComs may regulate by issuing orders of conditions to control the use of hydraulic surf clam and ocean quahog dredge gear in wetland resource areas<sup>6</sup>. In *Aqua King Fishery, LLC v. Conservation Commission of Provincetown*, 91 Mass. App. Ct. 712, 714 (2017), the appeals court held that a local regulation<sup>7</sup> prohibiting hydraulic dredging without filing an NOI with the local ConCom was invalid because it purported to regulate the commercial management of sea clams, contrary to G.L. c. 130,

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Regional management shall be based upon a regional plan developed by the cities and town concerned and approved by the director. The director is authorized to promulgate rules and regulations for the development, approval, and implementation of all regional plans.”

<sup>3</sup> In summary, G.L. c. 130, §17A authorizes the MFAC to approve or reject all regulatory proposals of DMF affecting the manner of taking fish; sizes of fish to be taken; seasons and hours for fishing; quantities of fish to be taken; and the opening and closing of areas to the taking of fish.

<sup>4</sup> This regulated fishery permit endorsement has been limited entry since 1993. This means no new permits are issued and permits are only available through the renewal or transfer of an existing permit. All transfers are subject to the transferability regulations established at 322 CMR 7.06 and any relevant DMF permit transfer policies.

<sup>5</sup> 322 CMR 6.08(2)(a) and (b) prohibit hydraulic dredging from November 1 through April 30 inside the 12' depth contour and from May 1 through October 31 inside the 20' depth contour.

<sup>6</sup> Under 310 CMR 10.25(2), the jurisdiction of the Conservation Commission extends into the Nearshore Areas of Land under the Ocean, defined as “that land extending from the mean low water line to the seaward limit of a municipality's jurisdiction, but in no case beyond the point where the land is 80 feet below the level of the ocean at mean low water. However, the nearshore area shall extend seaward only to that point where the land is 30 feet below the level of the ocean at mean low water for municipalities bordering Buzzard's Bay and Vineyard Sound (west of a line between West Chop, Martha's Vineyard and Nobska Point, Falmouth), 40 feet below the level of the ocean at mean low water for Provincetown's land in Cape Cod Bay, and 50 feet below the level of the ocean at mean low water for Truro's and Wellfleet's land in Cape Cod Bay.”

<sup>7</sup> Provincetown's by-laws include its Wetlands Protection Bylaw, at Chapter 12. In particular, Chapter 12-2 provides, “[e]xcept as permitted by the Conservation Commission or as provided in this bylaw, no person shall commence to . . . dredge . . . the following resource areas: . . . lands under water bodies . . .” Chapter 12-8 directs the ConCom to promulgate regulations to effectuate the by-law. Those regulations were promulgated by the ConCom in 2007 and include Article 8.1, which provides, “[n]o hydraulic dredging shall occur within the waters under the jurisdiction of the Provincetown Conservation Commission without a proper filing before the Conservation Commission.” The “by-law” at issue in *Aqua King* appears to be this regulation. Despite the appeals court holding that the by-law (*i.e.*, the regulation) was invalid, the regulation appears to be still on the books.

§ 52. The court went on to hold that even though DMF regulates commercial sea clamming, nothing prohibited further regulation by other authorities. *Id.* at 715-16. Because commercial fishing is not an exemption in the WPA, and because the activity at issue fell within MassDEP’s definition of the term “dredge,” (*i.e.*, it was “a slight temporary deepening of the ocean floor”) these commercial fishers continue to face local control over the use of DMF-permitted hydraulic dredge fishing gear in Provincetown waters. *See, id.* at 716.<sup>8</sup>

To the best of my knowledge, Provincetown is the only municipality to date that asserted its jurisdiction over the use of fishing gear pursuant to the WPA. However, it is conceivable that other municipalities could follow suit. Again, to the best of my knowledge, MassDEP has never asserted its management authority under the WPA to establish an overarching order of conditions to regulate fishing activity. Rather, MassDEP has historically left the permitting, regulation, and management of fishing gear to DMF.

From the fishing industry’s perspective, the term “hydraulic dredging” in both marine excavation projects and fisheries management seems incongruent. In the marine construction setting, hydraulic dredging is generally understood to be a process used to excavate trenches to lay cables; dig out channels and then refill them; and alter sediment for infrastructure projects. Whereas hydraulic dredge fishing gear is understood as a gear type that mechanically pumps pressurized water into the sediment to liquify top layer sediments to effectively extract target species buried just below the surface. While this fishing activity undoubtably results in the furrowing and repositioning of sediment, the scale and purpose of the fishing activity is far different than those hydraulic dredging activities that have been historically subject to WPA oversight and regulation.

#### **Status of Recent Filing of a Notice of Intent**

In August of 2022, Michelle Letts (a surf clam vessel owner), submitted a NOI to the Provincetown ConCom seeking to lawfully fish for surf clams using hydraulic dredge gear in Provincetown waters off Herring Cove Beach.<sup>9</sup> The application was submitted in good faith to avoid violating any state or municipal laws and regulations. The filing of this NOI cost the applicant in excess of \$1,400 paid to the Town of Provincetown and MassDEP. The ConCom did not hold a hearing on the NOI, and the applicant withdrew the NOI application and the filing fees from both entities were reimbursed. The purpose of the withdrawal was to provide state regulators (DMF & MassDEP) with an opportunity to create a more deliberate solution to address jurisdictional issues related to the use of dredge gear in wetland resource areas.

#### **Concerns Moving Forward**

Listed below are several broad concerns that I have regarding the precedent, the process, and the potential for unintended outcomes related to state and local control of fishing gear and fishing activity under the WPA. At present, the commercial surf clam fleet has largely avoided fishing in Provincetown waters. However, if the ConCom were to issue an Order of Conditions on an NOI, a precedent would be set requiring every vessel seeking to fish with hydraulic dredge fishing gear in Provincetown waters to submit and file a separate NOI with the local ConCom. There are about 36 permit holders authorized to fish for surf clams and ocean quahogs with dredge fishing gear and about 10 active vessels involved in the state waters fishery during any given year. Given Provincetown is a productive resource area, a sizeable proportion of the active fleet would likely move forward to file an NOI. Accordingly, the municipality would need to make decisions on Orders of Conditions for each applicant permit holder.

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<sup>8</sup> As noted by the court, neither DMF nor DEP participated in the court proceedings. *Aqua King*, 91 Mass. App. Ct. at 715, n. 7.

<sup>9</sup> These waters are within the jurisdiction of the ConCom. *See*, n. 5 above.

This in turn could set a precedent requiring commercial fishers to file a NOI and obtain an Order of Conditions from all municipalities where they intend to deploy hydraulic dredge fishing gear within wetland resource areas, even if the municipality does not actively apply its WPA authority to the use of this gear. This would effectively return the fishery back to the balkanized management program the legislature sought to end when it amended G.L. c. 130, §52 in 1982. In sum, this would create a costly<sup>10</sup> and onerous barrier for commercial fishers to prosecute a fishery they are permitted by DMF to participate in. This may constrain fishing effort in many areas resulting in substantial adverse negative economic impacts on the state's commercial surf clam and ocean quahog fishery. Additionally, it would create a substantial administrative burden on those state and local government bodies involved in the administration of the WPA, including MassDEP and local ConComs.

To date, WPA case law has focused on the management of hydraulic dredge fishing gear. However, it is conceivable that a local ConCom could expand upon existing precedent and apply its WPA authority to other bottom-tending fishing gears. MassDEP Wetlands Protection Act Regulations<sup>11</sup> and Water Quality Certification Regulations<sup>12</sup> broadly define the term dredging, and in the broadest reading, dredging could refer to any activity that temporarily deepens or widens a furrow or repositions sediment. Therefore, the potential exists for the WPA to apply to many other non-hydraulic bottom-tending fishing gears. Foremost, this includes other fishing gears that have been colloquially given the name “dredge.” These gears scour the sea floor to collect shellfish and invertebrate species and impact the top layer of sediment and result in sediment repositioning and suspension. These gears encompass both “dry” dredges and “drags”. Dry dredges use teeth or a blade to penetrate the sediment and extract target shellfish species (e.g., bay quahog dredge), whereas drags are pulled across the sea floor to capture those shellfish and invertebrates that reside above the sediment (e.g., sea scallop dredge, bay scallop dredge, oyster dredge, sea urchin dredge). While drags have less of an impact on the sea floor than penetrating dredge gear, they create sediment repositioning and suspension making them potentially vulnerable to WPA regulation.

### **Conclusions and Potential Solutions**

DMF understands the need for MassDEP oversight of coastal alteration projects under the WPA. However, eight years ago legal precedent was set confirming that the WPA's authority extends to the use of certain fishing gears. Yet, there has been no progress to address the jurisdictional challenges this creates and the impacts these challenges have on the commercial fishing industry. Rather, we remain at an impasse. MassDEP has not asserted its oversight authority under the WPA and any coastal ConCom can use their WPA authority to control the use of certain shellfish fishing gears in their wetlands resource areas and thereby manage and permit commercial shellfish fishing activities already regulated and permitted by DMF. While only one community has enacted such regulations, I expect others may follow suit. This requires a resolution.

It is my understanding that MassDEP could issue a Positive Determination of Applicability to every DMF permit holder seeking to fish “dredge gear” in any town exercising its WPA authority over the use of this commercial fishing activities. This would entail industry having to incur significant annual fees and then await a list of conditions that the municipality or MassDEP could place on the activity. This would impose a substantial burden on MassDEP staff and shift fisheries management issues away from DMF

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<sup>10</sup> Letts paid in excess of \$1,400 in state and local fees for her NOI submitted to in the Provincetown ConCom. If NOIs were to be required in other municipalities, fees could conceivably be in the tens-of-thousands of dollars for each permit holder. Compare this to the \$225 annual permit fee Letts pays to DMF to participate in the state-wide commercial surf clam and ocean quahog hydraulic dredge fishery.

<sup>11</sup> At 310 CMR 10.04, MassDEP defines the term dredging to mean, “to deepen, widen or excavate, either temporarily or permanently, land below the mean high tide line in coastal waters and below the high water mark for inland waters. The term dredge shall not include activities in Bordering or isolated vegetated wetlands.”

<sup>12</sup> At 314 CMR 9.02, MassDEP further defines the term dredging as, “the removal or reposition of sediment or other material from below the mean high tide line for coastal waters...”

and the Marine Fisheries Advisory Commission even though there is clear legislative authority at G.L. c. 130, §§17A and 52 to manage the commercial fishing activity. Moreover, I am uncertain about how this would interface with shellfish dredge fisheries primarily managed by municipalities under their home rule authority.

It is my view that a solution cannot be achieved through policy or regulation, particularly as MassDEP cannot create a regulatory exemption in the absence of a statutory exemption. Therefore, a statutory exemption is warranted. This can be accomplished through two mechanisms. The WPA could be amended to exempt the lawful use of DMF-permitted fishing gears—the WPA already exempts certain activities from its oversight including mosquito control, cranberry bog flooding and drainage, and other agricultural and aquacultural uses<sup>13</sup>. Alternatively, DMF’s enabling statute at G.L. c. 130, § 1A, could be amended to expressly state in that DMF has the sole and exclusive authority to regulate the harvest of marine fish and the effect of such activity on marine fish species and marine fisheries resources, and that fishers engaged in such DMF-permitted activities are not required to file a notice of intent, obtain a Chapter 91 license, or obtain a water quality certification. In my opinion, the latter fix may be the ideal resolution.

### **Modernizing DMF’s Management Plan**

On August 21, I convened DMF-permitted surf clam and ocean quahog dredge fishers and MFAC leadership to discuss the potential for substantial changes to surf clam fishery management in state waters. The seasonal closure of nearshore waters to the use of surf clam dredge fishing gears through the application of depth contours is outdated and difficult to enforce. My strong preference is to modernize these rules through the incorporation of modern geospatial vessel monitoring technologies. Using these technologies, DMF can create well-defined management area closures that are readily monitored and enforceable to ensure that dredge fishing gear is not conducted in closed areas, particularly sensitive marine habitats (*e.g.*, eel grass).

The owners of three surf clam vessels have volunteered to participate in a pilot program to test the utility of these technologies and management strategy. DMF has provided these three vessels with geospatial monitoring devices and is working with them to develop test polygons. DMF is also soliciting the surf clam dredge fleet for additional pilot program participants and I expect several more vessels to participate. If viable, I will work to develop draft regulations through a public rule-making process that would incorporate input from industry, the MFAC and SAP, MassDEP, local shellfish constables, ConComs, conservation groups, recreational fishers, and other interested stakeholders. I am hopeful that such a transparent process will help assuage environmental and conservation concerns regarding the use of this fishing gear.

Additionally, we have yet to receive the final report of a controlled fishing study performed in 2017 by the Provincetown Center for Coastal Studies regarding the impacts of hydraulic dredge fishing gear on the sediment and benthic communities in waters off Herring Cove. Preliminary results have been shared with DMF informally and many of the tested hypotheses were inconclusive. However, one conclusive finding from the study was that the Herring Cove area was determined not to be an area of high energy (waves and currents), and the dredge tracks detected from past fishing were more persistent than expected. These findings (once published and peer reviewed) could be included in discussions on how DMF should best manage the fishery.

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<sup>13</sup> In relevant part, G.L. c. 131, §40 states, “the provisions of this section shall not apply to any mosquito control work done under the provisions of clause (36) of section five of chapter forty, of chapter two hundred and fifty-two or of any special act; to maintenance of drainage and flooding systems of cranberry bogs, to work performed for normal maintenance or improvement of land in agricultural use or in aquacultural use; or to any project authorized by special act prior to January first, nineteen hundred and seventy-three.” It should also be noted here that the Provincetown By-Laws, at Chapter 12-3-2 exempt agricultural uses from this by-law.