

16.01: Purpose and Scope

~~The purpose of 322 CMR 16.00 is to establish procedures, performance criteria, and specifications for persons harvesting wild and aquaculture-reared shellfish for commercial purposes, and for selling shellfish into commerce and receiving shellfish from commercial harvesters or wholesale dealers. 322 CMR 16.00 is intended to ensure that the Commonwealth's shellfish industry complies with:~~

- ~~(a) the National Shellfish Sanitation Program (NSSP), which regulates the harvest and transport of shellfish; and~~
- ~~(b) the Food and Drug Administration (FDA) requirements for minimizing the risk of food borne illnesses to consumers within and outside of the Commonwealth.~~

322 CMR 16.01 Background and Purpose

The National Shellfish Sanitation Program (NSSP) is a program under the U. S. Food and Drug Administration (FDA) to promote the sanitary control of molluscan shellfish produced, harvested and sold for human consumption. The Interstate Shellfish Sanitation Conference (ISSC), comprised of representatives of the federal government, the states and industry, reviews, revises and updates the NSSP as needed. The NSSP has established a Model Ordinance (MO), which is updated on a bi-annual basis. The MO sets forth stringent guidelines addressing the harvest, handling, transportation and sale of shellfish to ensure that risks to public health associated with the consumption of shellfish are avoided.

To safeguard public health and to allow for shellfish produced, harvested and sold for consumption to enter interstate commerce, states must manage commercial shellfisheries in a manner that conforms to the NSSP's MO. The actions required by the MO include, but are not limited to: establishing shellfish growing area classifications and subsequent restrictions on the harvest of contaminated shellfish; adopting best practices for the harvest, handling and transport of shellfish to minimize the risk of foodborne illness; establishing a framework that provides for the expeditious recall of non-conforming shellfish product; addressing risks associated with *Vibrio parahaemolyticus*; describing the conditions by which contaminated shellfish harvest may be conducted; and managing marine biotoxin events.

The Division of Marine Fisheries manages its shellfish resources and commercial shellfish fisheries in strict conformity with the NSSP's MO. The Division has adopted the provisions of the MO in regulations at 322 CMR §16.00 to provide notice to the public of the comprehensive requirements applicable to the safe management of commercial shellfisheries and give the Division, through the Massachusetts Environmental Police, the authority to enforce against violations of these regulations. The Division's regulations also serve to safeguard public health, maintain consumer confidence and promote the state's shellfish fisheries.

The Division also manages the states shellfish resources and shellfisheries to enhance the propagation of naturally occurring populations, reduce the risk of spreading veterinary diseases, protect important fisheries habitat (e.g., eel grass), and promote commercial shellfisheries. To these ends, 322 CMR §16.00 establishes minimum sizes, shellfish management areas and related best practices.

Commented [SJ(1)]: Prior purpose and scope is replaced with revised version. The revised version addresses the role of the NSSP's Model Ordinance in greater detail. The Model Ordinance sets the sanitary guidelines for shellfish to be sold into interstate commerce. From the MO, DMF derives its shellfish growing area classification scheme; shellfish harvest, handling and transport rules; shellfish tagging requirements; Vp control plan; and the rules governing the harvest of contaminated shellfish, including the relay program.

16.02: Definitions

For purposes of 322 CMR 16.00:

322 CMR 16.02 General Definitions

The following definitions apply for the purposes of G.L. c. 130 and 322 CMR §16.00:

Approved Area means any shellfish growing area classified, pursuant to G.L. c. 130 §74, or §74A as Approved or Conditionally Approved, and not in a closed status pursuant to G.L. c. 130 §74A or under the provisions of a Conditional Area Management Plan.

Approved Standard Source of Ice means ice obtained from facilities permitted to manufacture ice pursuant to 105 CMR 500 or retail food facilities permitted to sell ice pursuant to 105 CMR 950.

~~Aquaculturist means any person authorized by the Director to propagate or rear shellfish for commercial purposes under the authority of a shellfish propagation permit issued pursuant to 322 CMR 7.01(4): *Special Permits*.~~

Bay Scallop means that species of shellfish known as *Argopectin irradians* and may be commonly referred to as a scallop.

Channeled Whelk means that species known as *Busycotypus canaliculatus*.

Closed Status means that a shellfish growing area classified as Approved, Conditionally Approved, Restricted or Conditionally Restricted has been closed to shellfish harvesting activities pursuant to G.L. c. 130 §74A or in the case of a Conditionally Approved area when the municipality closes an area under provisions of a Conditional Area Management Plan.

Commercial Fisherman means any person who may catch, possess and land shellfish for the purpose of sale, barter or exchange or keeps for family use any shellfish taken under the authority of a commercial fisherman permit issued by the Director pursuant to G.L. c. 130 §§2, 75 and 80 and 322 CMR §7.01(2). This shall include shellfish aquaculturists and wild shellfish harvesters.

Commercial Fishing means fishing for shellfish for the purpose of sale, barter or exchange.

Commercial Purposes means the possession or transportation of any shellfish for any fare, fee, rate, charge, sale, exchange, trade or other consideration that is either directly or indirectly in connection with any business or any other undertaking intended for profit.

Conditional Area Management Plan means a plan required by the NSSP that is approved by the Division and sets forth the criteria and performance standards to open and close Conditionally Approved and Conditionally Restricted shellfish growing areas to the harvest of shellfish.

Container means any bag, sack, tote, conveyance or other receptacle used for containing shellfish for holding or transporting.

Contaminated Area means any shellfish growing area classified, pursuant to G.L. c. 130 §74 or §74A, as Prohibited, Restricted, Conditionally Restricted, Conditionally Approved or Approved and in a closed status.

Commented [SJ(2): The definitions section has been updated. Many of the new definitions are derived from the MO. Some of the existing definitions have been updated or refined.

Commented [SJ(3): New definition for a term used in shellfish classification to describe a non-contaminated area where shellfish may be harvested from. This is consistent with the definition in the MO.

Commented [SJ(4): New definition germane to shellfish sanitation. If shellfish is iced – whether mandatory (e.g., Vibrio control) or discretionary – the MO establishes that the ice must meet certain sanitation requirements. This requirements currently exist in shellfish permit conditions. Consistent with MO.

Commented [SJ(5): Term is replaced by “shellfish aquaculturist” to increase specificity.

Commented [SJ(6): New definitions in this section for shellfish species.

Commented [SJ(7): New definition for a term used in shellfish classification to describe an area that is closed to shellfish fishing due to predictable changes in water quality that produce contamination (e.g., rainfall). Consistent with MO.

Commented [SJ(8): New generic definitions to describe certain commercial fishing terms of art.

Commented [SJ(9): New definition for a term used in shellfish classification. Growing areas that are in a conditional classification may be opened under such a plan. Consistent with MO.

Commented [SJ(10): New generic definitions to describe certain commercial fishing terms of art. Consistent with MO.

Contaminated Shellfish means any shellstock within or taken from any contaminated area.

Commented [SJ(11): New definition for a term used in shellfish classification, as it pertains to contaminated shellfish. Consistent with MO.

Contaminated transplant or relay means the transfer of any sized shellfish by municipalities from a Restricted, Conditionally Restricted or Conditionally Approved shellfish growing area in the closed status to any Approved or Conditionally Approved area for propagation and natural purification to enhance the public shellfisheries.

Commented [SJ(12): New definition that addresses the contaminated relay program. Consistent with MO.

Cull means to discard undersize or broken shellfish during harvest by fishermen or shellfish aquaculturists; or the sorting, grading and cleaning of shellfish for purposes of sale; or replanting of shellfish at the licensed shellfish aquaculture grant site by a shellfish aquaculturist or their employee.

Culture Activity means those activities conducted by shellfish aquaculturists or their employees that are authorized in writing by the Director and occur at locations other than the licensed shellfish aquaculture grant site. This includes but is not limited to the sorting, cleaning, culling, grading, pitting or over-wintering of cultured shellfish.

Commented [SJ(13): New generic definitions to describe certain shellfish aquaculture terms of art. Consistent with MO.

Dealer means any person, business or entity that is permitted in accordance with G.L. c. 130 §80 and 322 CMR §7.01(3) to purchase, or sell shellfish at a wholesale or retail level.

Commented [SJ(14): New generic definition for this section.

Depuration means the process of reducing the pathogenic organisms that may be present in shellstock by using a controlled aquatic environment as the treatment process.

Commented [SJ(15): New generic definition for this section.

Director means the Director of the Division of Marine Fisheries or his or her designee.

Discard means to return live shellfish to the sea.

Commented [SJ(16): New generic definitions to describe a term of art.

Division means the Massachusetts Division of Marine Fisheries.

European oyster means that species of shellfish known as *Ostrea edulis*.

Commented [SJ(17): New definitions in this section for shellfish species. This is different than the American oyster species, commonly known as "oyster".

FDA means the United States Food and Drug Administration.

Fishing or Fish For means to harvest, catch or take, or attempt to harvest, catch or take any shellfish. For vessels using mobile gear, a vessel is presumed to be fishing unless the dredge gear is out of the water and secured to the vessel's side or stern.

Commented [SJ(18): New generic definitions to describe a term of art.

Growing Area means any site which supports or could support the propagation of shellstock by natural or artificial means. The Division has listed and mapped all growing areas in the waters under the jurisdiction of the Commonwealth and these geographic areas are made available to the public on the Division's website.

Commented [SJ(19): New definition for a term used in shellfish classification. Used to describe a specific hydrographically connected area that has been mapped by DMF. Consistent with MO.

~~Icing means applying ice made from approved sources of potable water to oysters, as established under the National Shellfish Sanitation Program Model Ordinance.~~

Icing means to apply ice made from a DMF approved potable water source to shellfish for temperature control.

Commented [SJ(20): Replaces old definition for icing consistent with MO definition. New definition applies to all shellfish, rather than only oysters. DMF only mandates the icing of oysters under the Vp rules, but ice may be applied to other shellfish and must be done in compliance with the MO for sanitary purposes.

Knobbed whelk means that species known as *Busycon carica*.

Commented [SJ(21): New definition in this section for shellfish species.

Land means to transfer or attempt to transfer shellfish onto any land, pier, wharf, dock or other artificial structure or for a vessel with any shellfish onboard to tie-up to any dock, pier or artificial structure.

License Site means the specific portion of the coastal waters of the Commonwealth granted by the municipality where an aquaculturalist is licensed to propagate shellfish in accordance with M.G.L. c. 130, § 57.

Commented [SJ(22): This old definition is replaced by the new definition for shellfish aquaculture site.

Lot means containers of shellfish identified with the same time of removal from a single defined growing area gathered by a single permit holder.

Market Bound means all shellfish removed from a shellfish growing area by a commercial fisherman intended for commercial purposes on that calendar day.

Market Sized means any shellfish that conform to minimum shellfish sizes, as established at 322 CMR 6.00, and may be harvested and sold for commercial purposes.

Commented [SJ(23): New generic definitions to describe a term of art.

Model Ordinance or MO means that part of the most recent version of the *National Shellfish Sanitation Program (NSSP) Guide for the Control of Molluscan Shellfish* that sets forth the requirements that states have agreed to enforce through their participation in the Interstate Shellfish Sanitation Conference (ISSC), which are minimally necessary for the sanitary control of shellfish produced from that state to ensure that it is safe for human consumption.

Commented [SJ(24): New definition that defines the Model Ordinance, which sets the base guidelines for commercial shellfish sanitation management.

Moderately Contaminated Shellfish means any shellstock within a shellfish growing area classified as Restricted or Conditionally Restricted in the open status.

Commented [SJ(25): New definition for a term used in shellfish classification, as it pertains to contaminated shellfish that may be harvested pursuant to 322 CMR 10.00.

National Shellfish Sanitation Program or NSSP means the cooperative State, FDA, Industry program for the sanitary control of shellfish that is adequate to ensure that the shellfish produced in accordance with these guidelines will be safe and sanitary.

Commented [SJ(26): New definition that defines the cooperative body that develops the MO.

Ocean Quahog means that species of shellfish known as *Arctica islandica* and may be commonly referred to as a sea quahog or mahogany quahog.

Commented [SJ(27): New definition in this section for shellfish species.

Open Status means a shellfish growing area classified as Approved, Conditionally Approved, Restricted or Conditionally Restricted that has not been closed pursuant to G.L. c. 130 §74 or under provisions of a Conditional Area Management Plan.

Commented [SJ(28): New definition for a term used in shellfish classification as it pertains to areas where shellfish may be harvested from. Consistent with MO.

Oyster means that species of shellfish known as *Crassostrea virginica* and also commonly known as the eastern oyster or American oyster.

Commented [SJ(29): New definition in this section for shellfish species.

Primary Buyer means any wholesale dealer, permitted in accordance with G.L. c. 130 §80 and 322 CMR §7.01(3) and further authorized by the Director pursuant to 322 CMR §7.07 to engage in the primary purchase of shellfish from any permitted commercial fisherman.

Primary Purchase means the first commercial transaction by sale, barter or exchange of any shellfish after its harvest.

Commented [SJ(30): New definitions for terms related to who commercial fishermen may sell shellfish to.

Prohibited Shellfish Growing Area means a growing area classified pursuant to G.L. c 130, § 74 or § 74A as Prohibited, where the harvest of shellfish is prohibited for any purpose, except if otherwise

approved by the Director for the purposes of depletion or the nursery grow-out of seed for aquaculture and propagation.

Propagation means any shellfish planting activity conducted by municipalities or the Division to increase the supply of shellfish available to the public fishery.

Public Health means the Massachusetts Department of Public Health.

Sanitation Device means a U.S.C.G. approved sewage disposal device, toilet or receptacle designed to prevent the overboard discharge of sewage or bodily fluids. This device shall conform to the regulations set forth at 33 CFR 159.57.

Sea Scallop means the species known as *Placopecten magellanicus* and commonly known as the Atlantic deep sea scallop.

Seed means shellstock that is less than the minimum size prescribed at 322 CMR 6.20.

Shellfish means blood arcs, clams, conchs, limpets, mussels, american oyster, european oyster, periwinkles, quahogs, razor clams, bay scallops, surf clams, ocean quahogs, sea scallops, softshell clams, whelks and winkles.

Shellfish aquaculture means the planting and raising of shellfish at a specific location, licensed in accordance with G.L. c. 130 §57, which results in the commercial production of shellfish.

Shellfish aquaculturist means any person permitted by the Division pursuant to G.L. c. 130 §§2, 17B, and 80 and 322 CMR §§7.01(4)(c) and 15.04 to plant and raise shellfish at a specific location, licensed in accordance with G.L. c. 130 §57, which results in the commercial production of shellfish.

Shellfish aquaculture grant site means the specific portion of the coastal waters of the Commonwealth granted by the municipality where a shellfish aquaculturist is licensed to propagate shellfish in accordance with M.G.L. c. 130, § 57.

~~**Shellfish Growing Area** means any geographic area within waters under the jurisdiction of the Commonwealth that have been listed and mapped by the Division as a Designated Shellfish Growing Area (DSCA) and made available to the public on the Division's website under information on the Shellfish Sanitation and Management Program. Such areas support or could support the propagation of shellstock and are used for the purpose of shellfish classification, traceability and management.~~

~~**Shellstock** means live and unprocessed molluscan shellfish with the shell intact.~~

Shellstock means any live shellfish in the shell.

Shuck means the removal of one or both shells to process, remove and retain only the meat or the adductor muscle from the shellstock.

Standard Fish Tote means a container that does not exceed the volume of 6,525 cubic inches.

Surf clam means that species of shellfish known as *Spisula solidissima* and may be commonly

Commented [SJ(31): New definition for a term used in shellfish classification as it pertains to areas where the harvest of shellfish is permitted. Consistent with MO.

Commented [SJ(32): New definition for a term of art related to the planting of shellfish. Consistent with MO.

Commented [SJ(33): New definition for a term of art for a human waste receptacle. Consistent with MO.

Commented [SJ(34): New definition in this section for shellfish species.

Commented [SJ(35): New definition to delineate between legal sized shellfish that may be commercially harvested and sold and sub-legal sized shellfish that may only be possessed for propagation.

Commented [SJ(36): New definition consistent with the statutory definition at GL c. 130.

Commented [SJ(37): New definition that describes what shellfish aquaculture is. Covers and therefore replaces prior definition for license site.

Commented [SJ(38): New definition that replaces old definition for aquaculturist. New definition is more specific.

Commented [SJ(39): This old definition is replaced by the new definition for shellfish aquaculture site.

Commented [SJ(40): Old definition replaced with new definition for "Growing Area". New growing area definition is more concise.

Commented [SJ(41): New definition is more concise.

Commented [SJ(42): New definition for a term of art.

Commented [SJ(43): New definition for a term of art in this section. This definition is used elsewhere in 322 CMR.

referred to as a sea clam or Atlantic surf clam.

Time of Harvest means for sub-tidal areas when the first piece of shellfish in a lot is taken from the water on any calendar day. Time of harvest for intertidal areas means when the first piece of shellfish in a lot is exposed during a single low tide cycle or when the first piece of shellfish in a lot is taken from the water or sediment, whichever occurs first.

Trip means that period of time that begins when a fishing vessel or shellfish harvester departs from a dock, berth, beach, mooring, seawall, ramp or port to carry out a commercial fishing operation and terminates with the return to that dock, berth, beach, mooring, seawall, ramp or port, or with the landing of any fish.

Vessel means any commercial fishing vessel, boat, ship or other water craft registered under the laws of the Commonwealth, as defined at G.L. c. 130 §1, and which is used to harvest shellfish for any purpose of sale, barter, or exchange and shall include any vessel authorized under the laws of the United States to carry passengers for-hire exclusively to harvest shellfish.

~~Wet Storage means the storage of shellstock from growing areas in the approved classification or in the open status of conditionally approved classification in containers or floats in natural bodies of water or in tanks containing natural or synthetic seawater at any permitted land-based activity or facility.~~

Wet Storage means the storage by a dealer of shellstock from an Approved growing area in the open status or a Conditionally Approved growing area in the open status in containers or floats in natural bodies of water or in tanks containing natural or synthetic seawater at any permitted land-based activity or facility. This definition shall not apply to any shellfish depuration activity conducted in accordance with 322 CMR 10.00.

Commented [SJ(44): New definition in this section for shellfish species.

Commented [SJ(45): Definition moved from Vp section. Revised to apply more broadly to all shellfish, rather than be specific to oysters. Applicable to shellfish tagging and consistent with MO.

Commented [SJ(46): New definition for a term of art in this section. This definition is used elsewhere in 322 CMR.

Commented [SJ(47): New definition for a term of art in this section. This definition is used elsewhere in 322 CMR.

Commented [SJ(48): New definition has more specificity that this is only an activity that dealers may be permitted to do under certain conditions. This is consistent with the historic understanding of wet storage.

322 CMR 16.03 Shellfish Growing Area Classification

(1) **Background and Purpose.** The NSSP's Model Ordinance requires that states regulate the waters under their jurisdiction that support or could support shellfish and determine if these areas meet the sanitary conditions necessary to allow the harvest of shellfish for human consumption. The Division has met this requirement by its sanitary classification of the approximately 1.7 million acres of the overlying waters under the jurisdiction of the Commonwealth. The Division has further classified these waters into 303 designated shellfish growing areas based on hydrographical and geographic features.

The Division's shellfish growing area classifications are based on an extensive assessment of local environmental conditions and pollution sources, including impacts to water quality in the area. The principal components of these sanitary surveys, which are conducted by Division staff trained by the U.S. Food and Drug Administration, include: (1) an evaluation of pollution sources that may affect an area; (2) an evaluation of the hydrographic and meteorological characterizes that may affect the distribution of pollutants; and (3) an assessment of water quality. Additionally, shellfish are tested for various poisonous or deleterious substances based on assessment of pollution sources identified by the sanitary survey and as a result of oil and chemical spills. The results of the sanitary survey is summarized in a written report by the Division.

In accordance with G.L. c. 130 §§74 and 74A, the Division classifies a shellfish growing area based on the results of the sanitary survey and as required by the Model Ordinance. Depending on the extent to which an area is contaminated, the Division will make one of the following classification determinations for the area: Approved; Conditionally Approved; Restricted; Conditionally Restricted; and Prohibited. The Division's classification of the shellfish growing area determines whether the harvest of shellfish is approved with or without restriction or prohibited in all circumstances.

The Division manages the statewide shellfish safety and sanitation program to ensure shellfish are safe to harvest and protect public health. The municipalities control the regulation and management of both commercial and non-commercial shellfisheries in waters under municipal control, provided such waters are classified by the Division as Approved or Conditionally Approved while in an "Open Status". Certain Conditionally Approved areas that are predictably impacted by rain events can be managed by municipalities under an NSSP-required Conditional Area Management Plan.

Municipalities are then allowed to open and close these Conditionally Approved areas based on performance standards and subject to annual evaluation by the Division. Areas classified as Restricted or Conditionally Restricted are subject to state control, unless the Division has approved a local *Shellfish Conservation and Management Plan* pursuant to G.L. c. 130, §75. In such cases, municipalities are granted limited shellfisheries management authority when these areas are in an Open Status but are not allowed to change the sanitary status of these areas from open or closed on their own.

The scope of 322 CMR 16.03 includes a description of each of the shellfish growing area classifications, and sets forth the requirements applicable to each classification and the process for providing public notification regarding the classification and status.

(2) Shellfish Growing Area Classifications and the Harvest of Shellfish Under Certain Certifications.

Commented [SJ(49): New section of regulation. This section sets forth why DMF classifies growing areas; what each classification is; how that affects the harvest of shellfish; and how the public can be made aware of classifications.

This codifies DMF's long standing practice. This is being codified in response to recent enforcement incidents. DMF was informed that enforcement and compliance with its classification rules would be improved if DMF better described this in regulation.

These regulations do not change any classifications or controls on the harvest of shellfish. This merely codifies and explains our long standing classification program.

Commented [SJ(50): The background and purpose explains the MO's mandate for shellfish classification and DMF's responsibility to classify all growing areas. The MO requires each state have the legal means to classify shellfish areas and enforce public health closures. These regulations place DMF in unquestionable compliance with the MO.

Commented [SJ(51): This sub-section describes the 5 classifications. It describes under what conditions harvest of shellfish is allowed or prohibited under each classification. It also provides exemptions to harvest prohibitions for certain specific permitted activities. This is done consistent with the MO.

a. **Approved.** An Approved shellfish growing area has been subject to a sanitary survey that demonstrates shellfish within the growing area meet the sanitary conditions necessary for direct human consumption. An Approved shellfish growing area may be open to the harvest of shellfish for direct human consumption, subject to municipal shellfish management regulations established in accordance with G.L. c. 130 §52. The harvest of shellfish from Approved shellfish growing areas may be prohibited by the Division under an emergency designation of contamination made in accordance with G.L. c. 130 §74A.

b. **Conditionally Approved.** A Conditionally Approved shellfish growing area has been subject to a sanitary survey that demonstrates shellfish within the growing area meet the sanitary conditions necessary for direct human consumption under certain conditions described in a Conditional Area Management Plan. The status of a Conditionally Approved shellfish growing area may change from Open to Closed in response to environmental conditions such as impacts to water quality from pollution sources or other predictable changes in water quality. The harvest of shellfish from a Conditionally Approved shellfish growing area in the Open Status may be allowed for direct human consumption, subject to municipal shellfish management regulation established in accordance with G.L. c. 130 § 52. The harvest of shellfish from a Conditionally Approved shellfish growing area may be prohibited by the Division under an emergency designation of contamination made in accordance with G.L. c. 130 §74A or under the provisions of a Division-approved Conditional Area Management Plan for that area.

c. **Restricted.** A Restricted shellfish growing area has been subject to a sanitary survey that demonstrates shellfish within the growing area contain a limited degree of contamination at all times. The harvest of shellfish from a Restricted shellfish growing area for direct human consumption is prohibited, except as provided at 322 CMR 16.03 (2)(f).

d. **Conditionally Restricted.** A Conditionally Restricted shellfish growing area has been subject to a sanitary survey that demonstrates shellfish within the growing area contain a limited degree of contamination at all times and is subject to intermittent impacts to water quality from pollution sources. The status of a Conditionally Restricted shellfish growing area may change from Open to Closed in response to such intermittent water quality impacts or other environmental conditions affecting water quality, including predictable changes in water quality. The harvest of shellfish from a Conditionally Restricted shellfish growing area is prohibited, except as provided at 322 CMR 16.03(2)(f).

e. **Prohibited.** A Prohibited shellfish growing area has been subject to sanitary survey that demonstrates shellfish within the growing area contain contamination and pollutants at all times and pose a public health risk. The harvest of shellfish from a Prohibited shellfish growing area is prohibited, except as provided at 322 CMR 16.03(2)(f).

f. **Exceptions.** The following activities may be conducted within shellfish growing areas that have been classified as contaminated and shellfish harvest is otherwise prohibited:

1. **Contaminated bait fishery.** A surf clam dredge contaminated bait fishery may be conducted in shellfish growing areas classified as Prohibited in accordance with 322 CMR 6.08(7).

2. **Contaminated shellfish relay.** Contaminated shellfish relays may be conducted in shellfish growing areas classified as Restricted, Conditionally Restricted and Prohibited and Conditionally Approved and in the Closed Status in accordance with

322 CMR 16.08.

3. Depuration fishery. A depuration shellfish fishery may be conducted in shellfish growing areas classified as Restricted or Conditionally Restricted in the Open Status in accordance with 322 CMR 10.00.

4. Nursery Culture. The culturing and grow-out of hatchery seed may occur in shellfish growing areas classified as Restricted, Conditionally Restricted or Prohibited subject to the conditions set forth in a special project transplant permit issued in accordance with 322 CMR 7.01(4)(c).

(3) Notification of Shellfish Growing Area Classifications. To ensure that the public is aware of the classification of all shellfish growing areas and to safeguard public health by protecting against the consumption of contaminated shellfish, the Division shall:

- a. Announce changes to existing shellfish growing area classifications in accordance with the public notification procedures set forth at G.L. c. 130 § 74A.
- b. Make available to the public a list of all shellfish growing areas, their boundaries and their classification on the Division's website.
- c. Make available to the public maps depicting all shellfish growing areas and their classification on the Division's website.

(4) Changes to Shellfish Growing Area Status. Changes to environmental conditions affecting water quality, or the presence of pollutants or toxins in such waters may render shellfish unfit for consumption and hazardous to public health.

- a. **Designation of Contamination of Shellfish Growing Areas.** In accordance with G.L. c 130 §74A, the Director may issue a designation of contamination (change of status) to prohibit the harvest of all or certain species of shellfish from any shellfish growing area.
- b. **Status Changes to Conditionally Approved Shellfish Growing Areas Subject to a Local Conditional Area Management Plan.** For those shellfish growing areas classified as Conditionally Approved and subject to a Conditional Area Management Plan, the applicable municipality shall be responsible for providing public notification of any such status changes.

Commented [SJ(52): This describes how DMF will notify the public of changes to growing area classifications.

Commented [SJ(53): This describes how the public can be made aware of changes to growing area status based on changes to environmental conditions that may affect water quality and whether shellfish are fit to consume.

16.04: Possession of Shellfish from Areas Closed to Commercial Harvesting

~~(1) Purpose. Shellfish management in Massachusetts is a cooperative effort between municipalities, the Division and Public Health. M.G.L. c. 130, § 52 authorizes municipalities to open and close shellfish growing areas within local waters. Other provisions of M.G.L. c. 130 require the Division ensure that the shellfish purchased, sold and possessed in Massachusetts are from areas open to harvesting and to prevent the commerce of tainted shellfish harvested from non-compliant growing areas. Public Health administers and enforces regulations that ensure shellfish are safe to the consumer by conducting safety inspections of wholesale and retail fish dealers, truck transporting, and processing.~~

~~Shellfish populations are a key component of ecosystems that cross over municipal and state boundaries and are the foundation of commercial and recreational fisheries that are managed for sustainable harvest. Accordingly, the purpose of 322 CMR 16.04 is to further uniform compliance with state and local shellfish regulations and enhance shellfish populations by prohibiting commercial fishermen and dealers from harvesting or accepting any shellfish from an area that is not open for commercial harvest by either the Division or by the municipality, in accordance with M.G.L. c. 130, § 52.~~

~~(2) Commercial Harvester Restrictions. It is unlawful for any commercial fisherman to harvest or possess for commercial purposes any shellfish from a shellfish growing area that is not open for commercial harvest by either the Division or by the municipality that regulates commercial harvest in its waters pursuant to M.G.L. c. 130, § 52.~~

~~(3) Dealer Restrictions. It is unlawful for any wholesale dealer to accept from commercial fishermen or from another wholesale dealer any shellfish from a shellfish growing area that is not open for commercial harvest by the Division or by the municipality that regulates commercial harvest in its waters pursuant to M.G.L. c. 130, § 52.~~

322 CMR 16.04 The Sanitary Harvest, Handling and Transportation of Market Bound Shellfish

(1) Purpose. The purpose of 322 CMR 16.04 is to set forth the requirements applicable to the sanitary harvest, handling and transportation by commercial fishermen of market bound shellfish to prevent the contamination and deterioration of such shellfish and to safeguard public health. The additional requirements that apply to the harvest of oysters during the *Vibrio parahaemolyticus* (*Vp*) control season are set forth in 322 CMR 16.07.

(2) Vessels Used in the Harvest and Transport of Shellstock

a. Vessels used in the harvest and transport of shellstock shall be kept clean and free of debris.

b. Vessels used in the harvest and transport of shellstock shall have a sanitation device secured onboard the vessel in a manner that prevents the contamination of shellstock. The sanitation device shall be constructed of impervious, cleanable materials and have a tight

Commented [SJ(54): Section is being rescinded for a more comprehensive shellfish harvest and handling section. The provisions at sub-sections (2) and (3) remain in the new section at

Commented [SJ(55): This new section is a comprehensive section that addresses the sanitary harvest, handling and transport of shellfish. These regulations have been in effect by permit condition for the past three years and harvesters have signed affidavits that state they understand these requirements when they apply for or renew their permit annually. DMF is now codifying them as regulation to improve enforcement and compliance. These requirements are mandates of the MO.

Commented [SJ(56): These provisions require that vessels used in the harvest of shellfish be maintained in a certain fashion to prevent cross contamination that may create a public health risk. This is mandated by the MO.

fitting lid. The sanitation device shall be indelibly marked in a contrasting color “HUMAN WASTE” in letters that are at least 3 inches in height.

c. No dogs, cats and other pets shall be onboard the vessel while harvesting or transporting market bound shellstock.

4. Shellstock shall be stored onboard the vessel in raised areas to prevent contact with bilge water, fuel, oil or other chemicals and covered to prevent exposure to hot sun and birds.

(3) Containers of Shellstock

a. Following harvest, market bound shellstock shall be stored in containers.

b. Containers of shellstock shall be transported in a manner that prevents exposure to the sun and defecation by birds.

c. Materials in direct contact with shellstock shall be smooth, easily cleanable and impervious to water.

Commented [SJ(57)]: This establishes certain sanitation standards for containers used to hold shellfish to prevent cross contamination that may create public health risk. This is mandated by the MO.

(4) Washing of Market Bound Shellfish and Shellstock

a. All market bound shellfish and shellstock shall be washed thoroughly prior to loading onto a vehicle for transportation for sale to a Massachusetts wholesale dealer with a primary buyer endorsement for shellfish, permitted in accordance with G.L. c. 130 §80 and 322 CMR §§7.01(2) and 7.07 or prior to the sale to such dealer, whichever action occurs first.

b. All market bound shellfish and shellstock shall be washed thoroughly with either potable water or seawater from the growing area where the shellfish and shellstock was harvested from or from another growing area with the same classification and in the open status.

c. It shall be unlawful to wash market bound shellfish or shellstock with seawater taken from:

1. a growing area classified as Prohibited;
2. a growing area classified as Restricted, Conditionally Restricted, Conditionally Approved or Approved while in a closed status;
3. a growing area with a classification and status other than the growing area where harvested.

Commented [SJ(58)]: This establishes certain sanitation standards for washing shellfish to prevent cross contamination that may create public health risk. This is mandated by the MO.

(5) Sanitary Post-Harvest Icing of Shellfish.

a. Restrictions on the Source of Ice Used in the Post-Harvest Icing of Shellfish. Except as provided at 322 CMR 16.04(5)(b), It shall be unlawful for any commercial fisherman to ice shellstock with ice obtained from any source other than an approved standard source of ice.

b. Exceptions. Subject to the conditions in 322 CMR 16.04(5)(b)(1) below, a commercial fishermen may ice shell stock with ice obtained from sources other than an approved standard source of ice.

1. Potable Water Source. Ice shall be made from a potable water source that meets

Commented [SJ(59)]: This establishes certain sanitation standards for icing shellfish to prevent cross contamination that may create public health risk. This is mandated by the MO.

the drinking water quality standards in the Massachusetts Department of Environmental Protection's regulations at 310 CMR 22.00.

(a) **Municipal Drinking Water Sources.** Compliance with drinking water quality standards at 310 CMR 22.00 shall be documented through annual water quality reports or other data or information from the municipal public water supplier.

(b) **Non-Municipal Water Sources.** Compliance with drinking water quality standards at 310 CMR 22.00 shall be documented by proof of water quality testing completed within the previous six months by a laboratory certified by the Massachusetts Department of Environmental Protection or the U.S. Environmental Protection Agency to perform drinking water analyses in accordance with standard water quality testing methods.

2. **Ice Machines and Ice Makers.**

(a) Schematics for ice machines or makers shall be maintained that demonstrate adequate protection from backflow or back-siphonage; adequate air gaps in all drain pipes; food grade fittings and hosing; and adequate protection from water supply reservoirs.

(b) Ice machines and ice makers, including all bins, nozzles and enclosed components, shall be cleaned at the frequency specified by the manufacturer, or absent manufacturer specifications, at a frequency necessary to preclude the accumulation of soil or mold.

(c) A sanitation log shall be maintained that includes information on the dates and times the ice machine or ice maker was cleaned and the initials of the individual who conducted the cleaning.

3. All documents and records required to be maintained pursuant to 322 CMR 16.04 shall be made available upon request by either the Division or the Massachusetts Environmental Police. Failure to produce such documents and records upon request shall be prima facie evidence of a violation of 322 CMR 16.04(5).

(6) **Commercial Harvest and Sale of Shellfish and Shellstock**

a. Commercial fishermen shall sell shellfish only to a Massachusetts wholesale dealer with a primary buyer endorsement for shellfish, permitted in accordance with G.L. c. 130 §80 and 322 CMR §§7.01(2) and 7.07.

b. Commercial fishermen shall not handle or store shellfish at a facility that has not been authorized by Public Health or municipal Boards of Health prior to the sale of the shellfish to a wholesale dealer.

c. Commercial fishermen shall deliver shellfish to a Massachusetts wholesale dealer on the same calendar day the shellfish was harvested. During the period of May 1 – October 31, all shellstock shall be sold to a wholesale dealer within 18 hours of the harvest of the shellstock, unless they are surf clams or ocean quahogs intended for thermal processing only.

Commented [SJ(60)]: This clearly and concisely states a long standing requirement that shellfish only be sold to a wholesale dealer with a primary buyer endorsement for shellfish. Previously this was stipulated only through a requirement on the dealer side.

Commented [SJ(61)]: These are other mandates of the model ordinance that are implemented to ensure shellfish are not time-temperature abused creating a public health risk. These are currently requirements implemented through permit conditions.

d. Commercial fishermen shall not harvest, attempt to harvest, sell, or attempt to sell any shellfish from any growing area that is not open to commercial harvest by the Division or the municipality that regulates commercial harvest in its waters pursuant to G.L. c. 130 §52.

e. A dealer shall not accept or attempt to accept shellfish from any commercial fisherman or from another wholesale dealer that was taken from a shellfish growing area that is not open for commercial harvest by the Division the by the municipality that regulates commercial harvest in its waters pursuant to G.L. c. 130 §52.

(7) Exemptions. The provisions of 322 CMR 16.04 shall not apply to the commercial harvest, handling or transportation of moderately contaminated shellfish conducted in accordance with 322 CMR 10.00.

Commented [SJ(62)]: The regulations previously located at 322 CMR 16.04(2) and (3) are now located here.

Commented [SJ(63)]: The harvest of moderately contaminated shellfish for depuration by DMF's plant is subject to its own set of regulations. These regulations are set forth at 322 CMR 10.00.

16.03: Tagging of Shellfish

Commented [SJ(64): Tagging rules have been moved from 322 CMR 16.03 to 322 CMR 16.05.

~~(1) Requirements to Tag Containers and Bags of Shellfish:~~

~~(a) Commercial Fishermen and Aquaculturists. All persons harvesting shellfish for commercial purposes shall comply with the following tagging requirements:~~

~~1. Tagging Requirement. A tag with the features and harvest information specified in 322 CMR 16.03(1)(a)2. must be attached to all containers of shellfish shellstock before transport from the harvest site to the landing site.~~

~~2. Tag Features and Required Harvest Information. The tag shall be comprised of durable and waterproof material and be at least 13.8 square inches in size or at least 2" by 5¼". The tag shall contain, in the order specified, the following information written legibly in indelible ink:~~

- ~~a. The full name of the harvester;~~
- ~~b. the DMF Commercial Shellfish Permit number;~~
- ~~c. the date and time of harvest;~~
- ~~d. the type and quantity of shellstock;~~
- ~~e. the initials of the state of harvest; the Shellfish Growing Area name and number, and if applicable, the aquaculture site number; and~~
- ~~f. the following statement shall be written in bold capitalized type:~~

~~"THIS TAG IS REQUIRED TO BE ATTACHED UNTIL CONTAINER IS EMPTY OR IS RETAGGED, AND THEREAFTER KEPT ON FILE FOR 90 DAYS".~~

~~(b) Dealers. All persons accepting shellfish from commercial fishermen for commercial purposes shall ensure that all bags and other containers of shellfish are properly tagged as required in 322 CMR 16.03(1)(a). Any dealer who accepts or possesses untagged or improperly tagged shellfish shall be subject to the penalties in M.G.L. c. 130 and may also have their permit suspended or revoked by the Director.~~

~~(c) Prohibition. It is unlawful for any person to possess and transport shellfish for commercial purposes that is not tagged as required in 322 CMR 16.03.~~

322 CMR 16.05 Tagging of Shellfish

(1) Requirements to Tag Containers of Market Bound Shellfish. All commercial fishermen harvesting shellfish for commercial purposes shall affix a tag with the features and information specified at 322 CMR §16.05(1)(a). to each container of shellfish prior to landing.

a. Tag Features and Required Information. The tag shall be comprised of durable and waterproof material and at least 13.8 square inches in size and at least 2 5/8 inch in height by 5 1/4 inch in width. The tag shall contain, in order specified, the following information written in indelible ink:

1. The full name of the harvester;
2. The commercial shellfish permit identification number assigned by the Division;

Commented [SJ(65): This is more specific than the current regulation. The current regulation requires all shellfish being harvested for commercial purposes be tagged. The proposed regulation has this apply only to market bound shellfish. This more clearly exempts shellfish that are being harvested and possessed for culture activities.

Commented [SJ(66): The new tagging requirements are identical to the old regulations and are required by the MO.

3. The date and time of harvest;
4. The type of shellfish harvested;
5. The quantity of shellfish harvested;
6. The initials of the state of harvest;
7. The shellfish growing area name and number from where the shellfish was harvested;
8. The licensed shellfish aquaculture grant site number, if applicable; and
9. The following statement in bold and capitalized letters:

“THIS TAG IS REQUIRED TO BE ATTACHED UNTIL CONTAINER IS EMPTY OR IS RETAGGED AND THEREAFTER KEPT ON FILE FOR 90 DAYS.”

b. Requirements for Dealers Accepting Shellfish. Dealers accepting shellfish from any person shall ensure that all containers of shellfish are properly tagged as required by 322 CMR 16.05.

(2) Prohibitions. It shall be unlawful for:

- a. Any person to land or transport shellfish for commercial purposes unless each container of such shellfish bears a tag that strictly conforms to the requirements of 322 CMR 16.05;
- b. Any dealer to accept any container of shellfish from any person unless each container of such shellfish bears a tag that strictly conforms to the requirements of 322 CMR 16.05; and
- c. It shall be unlawful for any person to bulk tag shellfish in transport for commercial purposes, except that shellfish aquaculturists who are also wholesale dealers and primary buyers of shellfish may bulk tag shellfish taken from their licensed shellfish aquaculture grant site for transport to their wholesale dealer facility in accordance with a Bulk Tagging Plan approved by the Director.

(3) Exemption. The prohibitions at 322 CMR 16.05(2) shall not apply to containers of shucked bay scallops and sea scallops or to shellfish harvested in accordance with 322 CMR 10.00.

Commented [SJ(67)]: This new regulation more concisely states the provision set forth at 322 CMR 16.03(1)(b) in the current regulation.

Commented [SJ(68)]: By permit condition DMF exempts grower/dealers from tagging individual containers (e.g., bags) of shellfish and instead we allow them to “bulk tag” (i.e., one container with multiple bags within) of shellfish taken from their aquaculture site to their wholesale dealership. To have permit conditions issued, the grower/dealer must submit a plan to DMF to be approved by the Director or his designee. This would codify this allowance.

Commented [SJ(69)]: This prohibits the possession of shellfish that do not comply with the tagging requirements. This is consistent with existing prohibition at 322 CMR 16.03(c).

Commented [SJ(70)]: This explicitly exempts certain shucked scallop adductor muscles from shellfish tagging. This is because the adductor muscle is not the actual bivalve shellfish organism and does not pose a public health threat. Therefore, tagging of the shucked product is unnecessary. It is also incompatible with how the offshore sea scallop industry is conducted.

322 CMR 16.06 Reserved for Aquaculture

Commented [SJ(71)]: Establishes a reserved section. Long term plan is to review and codify DMF's longstanding aquaculture propagation permit regulations in this section.

16.05-16.07: Vibrio Management Plan for Harvest and Handling of Oysters

(1) Purpose. The purpose of 322 CMR ~~16.05~~ **16.07** is to set forth the protocols and performance standards of the Vibrio Management Plan for shellfish harvesters and dealers to minimize the risk to consumers of pathogens, including *Vibrio parahaemolyticus* (Vp) associated with consumption of raw oysters, ~~and applies to commercial fishermen, aquaculturists, and dealers possessing shellstock oysters.~~ **322 CMR 16.07 applies to commercial fishermen and dealers possessing shellstock oysters.**

Commented [SJ(72)]: Vibrio rules are now at 322 CMR 16.07. Primary changes to this section include: (a) refinements to regulatory language; (b) updated citations reflecting move from 322 CMR 16.05 to 16.07; and (3) removal of definitions redundant to terms used at 322 CMR 16.02.

(2) Definitions. For the purpose of 322 CMR 16.05, the following terms hold the following meanings:

Commented [SJ(73)]: Refines language in purpose section.

Adequately Iced means the amount and ~~application methods of ice described in 322 CMR 16.05(3) methods of applying ice~~ to completely surround all the oysters in a shellfish icing container to ensure their immediate and ongoing cooling, ~~as further specified at 322 CMR 16.07(3).~~

Commented [SJ(74)]: Updates citation and improves language.

Adequately Shaded means the measures required to be taken to protect oysters from direct exposures to sunlight.

~~Aquaculturist means any person authorized by the Director to propagate or rear shellfish for commercial purposes under the authority of a shellfish propagation permit issued pursuant to 322 CMR 7.01(4): Special Permits.~~

Commented [SJ(75)]: Definition is redundant to shellfish aquaculturist definition at 322 CMR 16.02 and is therefore rescinded.

Broadcast Re-submergence means the return of loose, market-sized oysters to the waters of the original ~~licensed site~~ **licensed shellfish aquaculture grant site from which they were harvested** following the off-site culling and/or oyster culture activities requiring re-submergence, ~~as described at 322 CMR 16.05(4) specified in 322 CMR 16.07(4).~~

Commented [SJ(76)]: Updates citation and refines language.

~~Commercial Fisherman means any person authorized by the Director to harvest shellfish for commercial purposes pursuant to 322 CMR 7.01(2): Commercial Fisherman Permits.~~

Commented [SJ(77)]: Definitions are redundant to those at 322 CMR 16.02 and are therefore rescinded.

~~Harvester Lot means containers of oysters identified by the harvest tag as having the same time of harvest and consisting of oysters from a single defined growing area gathered by a single commercial fisherman or aquaculturist.~~

Market Bound Oysters means all oysters removed from a designated shellfish growing area by a commercial fisherman ~~or aquaculturist~~ intended for commercial purposes on that calendar day.

Market Sized Oysters means those oysters that measure at least three inches shell length or 2½ inches shell length for those **shellfish** aquaculturists authorized by the Division pursuant 322 CMR 6.20(3): *Restrictions on Oysters and Quahogs Raised by Aquaculturists and Sold to Dealer* to possess and sell "petit" oysters.

Off-site Culling means an aquaculture practice of temporarily removing shellfish from the ~~licensed site (grant)~~ **licensed shellfish aquaculture grant site to an a shellfish** aquaculturists' permitted off-site culling location for the purposes of sorting, grading and cleaning the individual shellfish.

Oyster Culture Activities means activities conducted by some **shellfish** aquaculturists that ~~require the~~

involve the removal of oysters from the waters of the **license site (grant) licensed shellfish aquaculture grant site** for the purposes of sorting, culling, grading, pitting, over-wintering and/or the removal of fouling organisms to enhance oyster marketability.

Commented [SJ(78)]: Refines language

~~Primary Buyer means a seafood dealer authorized by the Director pursuant to M.G.L. c. 130, § 80 and 322 CMR 7.07: Dealers Acting as Primary Buyers to purchase shellfish directly from a commercial fisherman. This person is also identified as the Original Dealer in the Commonwealth's Vibrio Management Plan approved by the federal Food and Drug Administration.~~

Commented [SJ(79)]: Definition is redundant to the one at 322 CMR 16.02 and is therefore rescinded.

Re-submergence means the return of market size oysters back to the water of the **original license site (grant) licensed shellfish aquaculture grant site from which they were harvested after being previously they have been** removed for off-site culling and/or oyster culture activities, or after being returned by a primary buyer, as a result of recall specified at **322 CMR 16.05(4)-322 CMR 16.07(4)**.

Commented [SJ(80)]: Updates citation and refines language.

Shellfish Icing Container means a conveyance that is smooth, in good condition, is easily cleaned, impervious to water, insulated, self-draining, has a tight fitting lid, and a light-colored exterior.

~~Time of Harvest for sub-tidal areas means the time when the first oyster in a harvester lot is taken from the water on a calendar day and for intertidal area means the time when the first oyster in a harvester lot is exposed during a single low tide cycle or when the first oyster in a harvester lot is taken from the water, whichever occurs first.~~

Commented [SJ(81)]: Definition is redundant to the one at 322 CMR 16.02 and is therefore rescinded.

Time of Icing means the time when the last oyster or bag of oysters in a harvester's lot is placed in a shellfish icing container and is adequately iced in accordance with the procedure at **322 CMR 16.05(3) 322 CMR 16.07(3)**.

Commented [SJ(82)]: Citation is updated

Vp Logbook means the Division issued **bound** logbook required to be used by all commercial fishermen **and aquaculturists** during the Vp season **as defined in 322 CMR 16.05(2)**, to record required icing, shading and re-submergence information described at 322 CMR 16.07(3) and (4) **16.05(3) and (4)**.

Commented [SJ(83)]: Updates citation and refines language.

Vp Season means the time period from May 19th through October 19th when the Vibrio Management Plan is in effect.

(3) **Commercial Harvester Restrictions**. The following shall apply to all commercial fishermen **and aquaculturists** harvesting oysters during the Vp season.

(a) **Icing Requirements**.

1. **General Time to Icing**. All commercial fishermen **and aquaculturists** shall adequately ice oysters, as defined in **322 CMR 16.05(2)-322 CMR 16.07(2)**, within two hours of time of harvest or exposure, or prior to leaving the point of landing, whichever occurs first. Oysters must remain adequately iced until received by a wholesale dealer.

Commented [SJ(84)]: Updates citations and refines language.

2. **Seasonal Time to Icing Requirements for Certain Growing Areas**. From July 1st through September 15th, all commercial fishermen **and aquaculturists** who are

harvesting oysters in shellfish growing areas CCB-42, CCB-43, CCB-44, CCB-45, CCB-46, CCB-47 and V-20, shall adequately ice oysters, as defined in ~~322 CMR 16.05(2)~~ **322 CMR 16.07(2)**, within one hour of time of harvest or exposure, or prior to leaving the point of landing, whichever occurs first. Oysters must remain adequately iced until received by a wholesale dealer.

Commented [SJ(85): Updates citations and refines language.

3. Methods for Icing. To meet ~~these the~~ time to icing requirements **specified at 322 CMR 16.07(3)(a)**, commercial fishermen ~~and aquaculturists~~ **must shall** place oysters and ice into a shellfish icing container using one of the following methods:

a. Mesh bags containing oysters **must shall** be completely surrounded by ice, with at least two inches of ice between the bags and the bottom and sides of the shellfish icing container, and at least three inches of ice on top of the mesh bags;

b. Loose oysters placed into a shellfish icing container **must shall** be completely surrounded by ice, with at least two inches of ice at the bottom and sides of the shellfish icing container, and at least three inches of ice on top of the loose oysters;

c. Oysters held in an ice and water mixture (*e.g.*, ice slurry or cold water dip) **must shall** be fully submerged and the ice and water mixture must be at or below 45°F to inhibit growth and proliferation of bacteria; or

d. All ice and or water used to cool oysters **must shall** originate from a fresh potable water source or ocean water from an area classified as "Approved" or "Conditionally Approved" by the Division of Marine Fisheries and in the "open status".

Commented [SJ(86): Updates citations and refines language.

(b) Shading Requirement. All commercial fishermen ~~and aquaculturists~~ shall adequately shade oysters, as defined in 322 CMR ~~16.05(2)~~ **16.07(2)** immediately following harvest and until oysters are adequately iced. Materials in direct contact with oysters or bags of oysters must be smooth, easily cleanable and impervious to water.

Commented [SJ(87): Updates citation and refines language.

(c) Shellfish Icing Tag Requirement. In addition to the tagging requirements at 322 CMR ~~16.05~~ **16.03**, commercial fishermen ~~and aquaculturists~~ shall record the time of icing on all harvester tags affixed to containers of oysters or record the time of icing on a single harvester tag attached to a shellfish icing container. The use of a single harvester tag for the purpose of meeting this shellfish icing tag requirements does not exempt commercial fishermen ~~and aquaculturists~~ from attaching harvester tags, as specified at 322 CMR ~~16.05~~ **16.03**, to all individual containers of market bound shellfish. A single harvester tag for the purpose of meeting the shellfish icing tag requirements may be used in instances when:

Commented [SJ(88): Updates citations

1. All oysters in the shellfish icing container are from a single harvester lot;
2. The shellfish icing tag is attached to the shellfish icing container at the time of

icing and remains attached to the shellfish icing container until received by the primary buyer; and

3. The shellfish icing tag also includes the time of harvest, harvest date, harvest area, harvester identification and quantity (in pieces) of oysters harvested.

(d) Logbook Requirement. When landing oysters, all commercial fishermen ~~and aquaculturists~~ must have in their possession the Division ~~of Marine Fisheries~~ issued Vp logbook. The harvester, or his or her licensed employee, shall record in indelible ink the date, shellfish growing area, time of harvest, time of icing, quantity harvested (in pieces), and the dealer who received the product. The Vp logbook shall be filled out by the permit holder, or his or her licensed employee, at the time of landing before the day's harvest is placed in transit or leaves the landing site except that the primary buyer information may be completed upon receipt of the market bound oysters by the primary buyer.

Commented [SJ(89)]: Language is refined.

(e) Restrictions on Transport of Market Bound Oysters to the Primary Buyer. All market bound oysters shall be transported by the harvester, or his or her licensed employee, directly to the primary buyer's physical facility or received by the primary buyer at the landing site. Commercial fishermen ~~and aquaculturists~~ are prohibited from handling and/or holding market bound oysters at any unlicensed facility prior to receipt by the primary buyer.

Commented [SJ(90)]: Language is refined.

(4) Restrictions that Apply to Shellfish Aquaculturists Only.

Commented [SJ(91)]: Language is refined and citations updated.

(a) Re-submergence Requirements for Off-site Culling Practices. Market-sized oysters may be removed by a shellfish aquaculturist from **licensed shellfish aquaculture grant site** ~~the original license site~~ for the purpose of off-site culling, provided:

Commented [SJ(92)]: Language is refined.

1. All removed oysters are returned to and segregated on the **license site licensed shellfish aquaculture grant site** of at least ten days prior to being harvested for commercial purposes;

Commented [SJ(93)]: Language is refined.

2. Off-site culling activities are **conducted in accordance with conditions to the subject to** Aquaculture Propagation Permit **permit conditions**, issued to the **shellfish aquaculturist** by the Division pursuant to the authority at M.G.L. c. 130, § 80 and 322 CMR 7.01(7): *Conditions*; and

Commented [SJ(94)]: Language is refined.

3. **Shellfish aquaculturists shall notify the local municipal shellfish authority prior** ~~Prior~~ to the removal of any shellstock from a **license site licensed shellfish aquaculture grant site**, ~~harvesters are required to notify the local municipal shellfish authority.~~

Commented [SJ(95)]: Language is refined.

(b) Re-submergence Requirements for Oyster Processing Activities Conducted on Barges, Boats and Other Floating Structures. Market-sized oysters may be brought onboard barges, boats and other floating structures for the purpose of oyster processing

activities, provided:

1. All oyster processing ~~activity activities~~ that ~~is~~ are not conducted on the ~~license site licensed shellfish aquaculture grant site~~ shall take place within ~~the~~ ~~is conducted within the~~ same designated shellfish growing area as the ~~license site licensed shellfish aquaculture grant site~~;

Commented [SJ(96)]: Language is refined.

2. When oyster processing activities exceed two hours from the time of harvest or time of first exposure, all oysters subject to such activities must be returned to the licensed ~~shellfish aquaculture~~, segregated and re-submerged for at least ten days prior to being harvested for commercial sale; and

Commented [SJ(97)]: Language is refined.

3. When oyster processing activities do not exceed two hours from the time of harvest or first exposure, all oysters subject to such activities may either be properly tagged and harvested during that calendar day, in accordance with the procedures set forth at 322 CMR 16.00, or returned to the ~~original license site licensed shellfish aquaculture grant site~~, and ~~harvested not before the next calendar day~~ but shall not be harvested until at least the following calendar day.

Commented [SJ(98)]: Language is refined.

4. Between July 1st and September 15th, in shellfish growing areas CCB-42, CCB-43, CCB-44, CCB-45, CCB-46, CCB-47 and V-20, when oyster culture activities exceed the one hour time to icing requirement at ~~322 CMR 16.05(3)(a)2~~, 322 CMR 16.07(3)(a)(2), but do not exceed two hours from the time of harvest or first exposure, all oysters subject to such activities must be returned to the ~~original license site licensed shellfish aquaculture grant site~~ and shall not be harvested until ~~sooner than~~ the following calendar day.

Commented [SJ(99)]: Language is refined.

(c) Tagging and Logbook Requirements for Re-submerged Oysters.

1. Logbook Requirements. Shellfish aquaculturists shall maintain a record in their Vp logbook of all market-sized oysters returned to the ~~license site licensed shellfish aquaculture grant site~~ after off-site culling or oyster processing activities requiring re-submergence. The Vp logbook shall be filled out ~~by the permit holder, or his or her licensed employee~~, at the time of re-submergence when the last market-sized oyster is returned to the ~~license site licensed shellfish aquaculture grant site~~, except that the date-out information shall not be completed prior to the end of the ten day re-submergence period.

Commented [SJ(100)]: Language is refined.

2. Container Tagging Requirement. All containers of re-submerged oysters shall be marked with a waterproof green tag and legibly labeled in indelible ink with the statement "re-submerged" and with the date that the oysters were returned to the ~~license site licensed shellfish aquaculture grant site~~ for re-submergence. After such oysters have remained on the ~~license site licensed shellfish aquaculture grant site~~ for at least ten days, the green "re-submerged" tag may be removed from the containers and the oysters may then be harvested in accordance with those procedures set forth at 322 CMR 16.00.

3. Alternatives to Container Tagging Requirements. Shellfish aquaculturists who engage in broadcast re-submergence or ~~wish want~~ to mark multiple containers of re-submerged oysters using a single re-submergence tag **shall submit a re-submergence plan for the Division's approval at least 30-days prior to the start of the proposed activities. The re-submergence plan shall include, at a minimum, the following information: ~~may do so following the submission of a re-submergence plan to the Division for approval. The re-submergence plan must be submitted at least 30 days prior to the start of the activity and it must include, at a minimum, the following:~~**

Commented [SJ(101): Language is refined.

- i. A description of the re-submergence method (*e.g.*, broadcast, holding cars, cages, *etc.*);
- ii. A description of the segregation method to be utilized, including a site map marking the segregated re-submergence area; and
- iii. A description of the re-submergence tagging method to be utilized.

iv. All such re-submergence activities shall be conducted in accordance with the re-submergence plan approved by the Division.

Commented [SJ(102): New text clearly stipulates that re-submergence shall be done in accordance with the submitted and approved plan.

(d) Additional Re-submergence Restrictions.

1. Re-submergence of oysters may only be conducted by the permitted aquaculturists on the **same ~~license site~~ licensed shellfish aquaculture grant site** where the oysters originated, unless otherwise approved in advance in writing by the Division.
2. Except as provided for at 322 CMR ~~16.05(4)(b)~~ 16.07(4)(b), market-sized oysters returned to a **license site licensed shellfish aquaculture grant site** will be considered off-site culled and subject to the tagging, Vp log book and re-submergence requirements set forth at 322 CMR ~~16.05(4)~~ 16.07(4).

Commented [SJ(103): Language is refined and citations are updated.

(5) Disposition and Handling of Non-compliant Oysters and Recalled Oysters.

(a) Destruction of Non-complaint Oysters.

1. In the event that the Division, the local Shellfish Constable or the **Office of Law Enforcement Massachusetts Environmental Police** determines that a commercial fisherman ~~or aquaculturist~~ is in possession of oysters that are **in violation of the out of compliance with the** tagging, icing or other requirements set forth at 322 CMR 16.00, such oysters shall be destroyed **and properly disposed of by the commercial fisherman at his or her own expense.**

Commented [SJ(104): Language is refined.

Commented [SJ(105): Proposed regulatory language is consistent with current practice.

2. In the event that oysters distributed into commerce are recalled in the case of illness, such oysters shall be destroyed **and properly disposed of by the commercial fisherman at his or her own expense.**

Commented [SJ(106): Proposed regulatory language is consistent with current practice.

(b) Re-submergence of Non-compliant Oysters.

1. In the event of a recall resulting from the closure of a **harvest area** growing area due to illness, only those oysters received from harvesters and stored at a primary buyer's facility may be re-submerged.

Commented [SJ(107)]: Language is refined.

2. In the event that the Division or **the Department** of Public Health determines that a primary buyer is in possession of oysters **that do not comply with that violate** the tagging, icing or other requirements set forth at 322 CMR 16.00, such oysters may be returned to the **shellfish** aquaculturists, and re-submerged and segregated on the **license site** licensed shellfish aquaculture grant site where they originated for ten days under the supervision of the local Shellfish Constable.

3. **Shellfish** aquaculturists may harvest oysters that have been re-submerged in accordance with 322 CMR 16.05(5)(b), provided the following actions are taken:

i. Recalled oysters have been segregated and re-submerged on the **license site** licensed shellfish aquaculture grant site for a minimum period of ten days;

Commented [SJ(108)]: Language is refined.

ii. Recalled oysters are tagged with a waterproof green tag labeled in indelible ink with the statement "non-compliant" or "recalled" and the date of re-submergence;

iii. The return, segregation and re-submergence of oysters are documented in the Vp logbook, including recording the quantity of oysters, and date and purpose of the return and re-submergence, in accordance with 322 CMR ~~16.05(4)~~ **16.07(4)**; and

Commented [SJ(109)]: Updated citations.

iv. After such oysters remain on site for at least ten days, the green "non-compliant" or "recalled" tag may be removed and the oysters may then be harvested, subject to being tagged as specified in 322 CMR 16.00.

322 CMR 16.08 Municipal Contaminated Shellfish Relay and Transplant

(1) **Purpose.** The purpose of 322 CMR 16.08 is to set forth definitions, procedures, and requirements applicable to the harvest, relay and transplant of contaminated shellfish by municipalities from shellfish growing areas classified as Restricted, Conditionally Restricted, or Conditionally Approved in the Closed Status to shellfish growing areas approved by the municipal shellfish department and classified as Approved or Conditionally Approved in the Open Status for natural purification and propagation of shellfish. The provisions of 322 CMR 16.08 are intended to ensure that contaminated shellfish relay and transplant activities conducted by municipalities are in compliance with the NSSP thereby minimizing the risk of food borne illness to consumers, preventing the diversion of contaminated shellfish into commerce or for personal consumption, and avoiding the spread of veterinary disease.

In addition, as required by c. 47 §112, Acts of 2017, the Division has established at 322 CMR 16.08(6) a fee per bushel of contaminated shellfish to be paid by the municipality receiving the relayed shellfish to the municipality from whose waters the shellfish were harvested. The fee is to be used by the source municipality for its administration and enforcement of local shellfish management activities.

(2) **Definitions.** The following definitions apply for the purpose of 322 CMR 16.08:

Municipal Transplant means the transfer of contaminated shellfish by a municipality from a growing area classified as Restricted, Conditionally Restricted or Conditionally Approved in the closed status to transplant in a growing area classified as Approved or Conditionally Approved in the open status for the purpose of purging the contamination in such shellfish.

Municipal Transplant Site means a site identified in a Division-issued Shellfish Relay and Transplant Special Project Permit where contaminated shellfish may be transplanted for purging the contamination in such shellfish.

Receiving Municipality means a municipality issued a Division Shellfish Relay and Transplant Special Project Permit authorizing the harvest, relay or transplant of contaminated shellfish into that municipality's local waters.

Relay means the transfer of any sized contaminated shellfish by a municipality from a growing area classified as Restricted, Conditionally Restricted or Conditionally Approved in the closed status to a growing area classified as Approved or Conditionally Approved for the purpose of purging the contamination in such shellfish.

Source Municipality means a municipality which is the source of contaminated shellfish harvested for relay by the Division-permitted Receiving Municipality.

Supervising Authority means a shellfish constable duly appointed under authority of G.L. c. 130, § 98, or a Massachusetts Environmental Police Officer or other enforcement officer authorized to enforce G.L. c. 130, identified by the Receiving Municipality and in the Shellfish Relay and Transplant Special Project Permit to supervise the compliance of the harvest, relay or transplant activities in accordance with 322 CMR 16.08 and such Permit.

(3) **Permit.** No municipality or other person shall harvest, relay or transplant contaminated shellfish for the purposes described in 322 CMR 16.08 without a Shellfish Relay and Transplant Special Project Permit issued by the Division pursuant to 322 CMR 7.01(4)(2)(c). A copy of this

Commented [SJ(110): New regulations that describe DMF's long standing relay program, as well as the mandatory fee to be paid to the municipality where the relayed shellfish were harvested from.

Commented [SJ(111): Stipulates the permit necessary for the relay of contaminated shellfish.

permit shall be kept on the person of the Supervising Authority and other personnel during the course of the harvest, relay and transplant activities authorized by the permit.

(4) General Requirements.

- a. All contaminated shellfish being transplanted shall be tested by a pathologist approved by the Division, and the results of such testing must show that the shellfish is free of known shellfish diseases or is being harvested from shellfish areas currently approved by the Division.
- b. All contaminated shellfish harvested for relay and transplanting shall be removed from the source shellfish growing area, transported and replanted under the direct and continuous supervision of the Supervising Authority.
- c. Prior to the commencement of transplanting operations, signs shall be placed around the perimeter of the transplant site that provide a buffer of a minimum of 50 feet around the transplanted contaminated shellfish. Each sign shall include the following statements in bold capitalized letters: CLOSED TO SHELLFISHING. AREA PLANTED WITH CONTAMINATED SHELLFISH.
- d. During the course of the harvest, relay or transplant activities, the Supervising Authority shall collect and hold any commercial shellfish permits of all personnel and vessels involved in any aspect of the harvest, relay or transplanting of contaminated shellfish conducted under the authority of a Shellfish Relay and Transplant Special Project Permit.

Commented [SJ(112): This section sets forth the general requirements of the relay program, previously managed by permit condition.

(5) Requirements Specific to the Receiving Municipality

- a. The Receiving Municipality may hire a contractor to act as its agent to conduct the harvest, relay, transport, and reporting activities required by the Shellfish Relay and Transplant Special Project Permit.
- b. The Receiving Municipality, or its contractor, shall make arrangements with the Supervisory Authority identified in the Shellfish Relay and Transplant Special Project Permit to supervise, inspect and ensure compliance of the the harvest, relay, transport, and reporting activities required by 322 CMR 16.08 and Permit.
- c. The commercial shellfish permits associated with any person or vessel involved in the harvest, relay or transplanting of contaminated shellfish shall be surrendered temporarily to the Supervising Authority while the contaminated shellfish harvest, relay and transplant activities are being conducted pursuant to the Shellfish Relay and Transplant Special Project Permit.
- d. The contaminated shellfish harvest, relay and transplant activities shall be conducted only:
 - 1. During periods when the bottom water temperature in the transplant site remains above 45°F.
 - 2. During periods of good visibility.
 - 3. During the hours of sunrise and sunset.

Commented [SJ(113): Sets for the requirements for the town receiving the contaminated shellfish, previously managed through permit condition.

4. In a manner that ensures that all shellfish harvested for transplanting shall be transported to and planted at the transplant site on the same day of harvest.

5. **Exception.** The Director may condition the Shellfish Relay and Transplant Special Project Permit in accordance with 322 CMR 7.01(7), to allow exceptions to same day transplanting requirement in the following circumstances as determined by the Director:

(a) when the shellfish must be transported long distances from the harvest site to transplant site, thereby making it infeasible to transplant the shellfish on the same day; or

(b) in the case of an emergency that necessitates the holding of contaminated shellfish overnight for next day transplanting.

e. All shellfish harvested for transplanting shall be placed in a container. The container shall bear a tag with the following information legibility written on it in indelible ink:

1. Shellfish Relay and Transplant Special Project Permit holder name;
2. Shellfish Relay and Transplant Special Project Permit number assigned by the Division;
3. The time of harvest;
4. The date of harvest;
5. Shellfish growing area where the contaminated shellfish were harvested from;
6. The municipality where the transplant site is located;
7. The following statement in bold capitalized letters: **CONTAMINATED SHELLFISH**

f. A log shall be maintained that documents for each separate harvest, relay and transplant conducted pursuant to the Shellfish Relay and Transplant Special Project Permit the following information:

1. The date of harvest;
2. The shellfish growing area of harvest;
3. The number of bags or containers of shellfish harvested;
4. The shellfish species harvested; and
5. The conveyances used for harvest, relay activities and at the transplant site.

(6) Contaminated Shellfish Transplant Fee

- a. **Receiving Municipality payment of fees.** At the conclusion of all of the annual harvest, relay and transplant activities conducted pursuant to the Shellfish Relay and

Commented [SJ(114): Sets forth the regulations establishing the fee required by the Acts of 2017.

Transplant Special Project Permit, the Receiving Municipality, or its contractor on behalf of the Receiving Municipality, shall remit to the Division a fee of \$1.00 for each bushel of shellfish harvested from waters of the Source Municipality during that year.

- b. Division disbursement of fees. The Division shall hold all contaminated shellfish transplant fees received from Receiving Municipalities and annually distribute such monies to each Source municipality based on proportional amounts of shellfish harvested in each Source Municipality. Such monies shall be used by the Source Municipality for its administration and enforcement of local shellfish management activities.
- c. Exemption. A municipality is not required to pay a contaminated shellfish transplant fee when it transplants contaminated shellfish from one growing area to another growing area located within the municipality.

322 CMR 16.09 Reserved Depurated Fishery Regulations

Commented [SJ(115)]: Establishes a reserved section. Long term plan is to review and recodify the moderately contaminated shellfish rules at 322 CMR 10.00 in this section.

16.06 16.10: Authority to Suspend Permits for Violations of 322 CMR 16.00

(1) Subject to the procedures in 322 CMR ~~16.06(2)(b)~~ **16.10(2)(b)**, the Director may suspend without a prior hearing the permit of a commercial fisherman, ~~aquaculturist~~, or a wholesale dealer whenever an officer authorized to investigate and enforce shellfish laws and regulations of the Commonwealth determines that there is reasonable cause for citing such permit holder for a violation of 322 CMR 16.00.

(2) Such permit suspension shall not be effective until the permit holder is in receipt of following information.

(a) The written report from the officer that sets forth the factual and regulatory basis for the officer's determination that there is reasonable cause for citing such permit holder for a violation of 322 CMR 16.00.

(b) written notice of the Division's authority under M.G.L. c. 130, § 80 and 322 CMR ~~16.06 16.10~~ to suspend the permit and a statement of the basis for such suspension, with reference to the enforcement officer's written report.

(c) An order to show cause from Director or his or her authorized designee that establishes a timely date and location for an adjudicatory proceeding to be conducted pursuant to M.G.L. c. 30A and 801 CMR 1.01: *Formal Rules* to adjudicate whether the permit should be revoked. The Division's order shall also inform the permit holder of his or her right to request an expedited hearing.

Commented [SJ(116)]: Section moved from 322 CMR 16.06 to 16.10. Changes to regulation include updates to embedded citations and one minor stylistic refinement to the language.

Commented [SJ(117)]: Citation updated and language refined.

Commented [SJ(118)]: Citation updated.