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September 11, 2023

1st AMENDED CERTIFICATE OF THE SECRETARY OF ENERGY AND ENVIRONMENTAL
AFFAIRS ESTABLISHING A SPECIAL REVIEW PROCEDURE

PROJECT NAME: Shellfish Aquaculture
PROJECT MUNICIPALITY: Statewide
PROJECT WATERSHED: Statewide
EEA NUMBER: 16583
PROJECT PROPONENT: Division of Marine Fisheries
DATE NOTICED IN MONITOR: August 10, 2022

Pursuant to the Massachusetts Environmental Policy Act (MEPA; M.G.L. c. 30, ss. 61-62L) and Section 11.09 of the MEPA regulations (301 CMR 11.00), I previously established a Special Review Procedure (SRP) on September 9, 2022 to guide MEPA review of shellfish aquaculture projects proposed on sites licensed by municipalities and whose operations are permitted by the Division of Marine Fisheries (DMF). This 1st amendment extends the expiration date of the SRP until January 15, 2024.

A draft SRP was previously published in the Environmental Monitor on August 10, 2022 for a 20-day public review and comment period. I received 6 comments, including from the Provincetown Shellfish Department, Wellfleet Shellfish Constable, and several nonprofit organizations including MassAudubon, Massachusetts Bays, and The Nature Conservancy. Comments were generally supportive of the effort to streamline regulatory review for smaller, less impactful aquaculture projects, but emphasized the importance of considering the cumulative impacts of multiple operations sited in close proximity to one another. Comments also requested that the scope and scale of the SRP be broadened to provide for a review of best management practices for aquaculture activities as a whole. As noted below, this SRP was proposed as a 1-year pilot to create a consistent review procedure for shellfish aquaculture projects, while allowing for reporting of cumulative impacts of projects located within the same waterbody. Participating Agencies planned to use the data collected during the 1-year

pilot period to consider a broader permitting framework and associated MEPA reviews for aquaculture activities as a whole. As agency discussions are ongoing, this 1st amendment extends the expiration date of the SRP until January 15, 2024.

Background

On August 16, 2018, the DMF requested that the Secretary of Energy and Environmental Affairs (EEA) create a Special Review Procedure (SRP) (the “2018 DMF request”) for shellfish aquaculture projects in the Commonwealth. As requested by DMF, notice of the request was published in the September 5, 2018 *Environmental Monitor*, which commenced a 20-day public comment period. I received comments on the 2018 DMF request from state agencies, regional planning commissions, environmental groups, and organizations working in support of the marine aquaculture industry. All comment letters expressed support for the request to establish an SRP. While a draft SRP was not published with the 2018 DMF request, the request letter indicated that the SRP would facilitate the development of a state-wide *Massachusetts Aquaculture Permitting Plan (MAPP)* that would support both private and municipal aquaculture activities. The DMF proposed to work with partner EEA agencies and a Citizen’s Advisory Committee (CAC) to develop environmental and public use standards that would be incorporated into the MAPP. The scope of the MAPP was envisioned to be broad and include shellfish propagation and restoration projects, and as warranted, other activities such as macroalgae and finfish culture. The MAPP would then allow for streamlined MEPA reviews of projects satisfying the standards and best practices set forth in the MAPP.

Since the publication of the 2018 DMF request, DMF and partner EEA agencies have continued to convene to discuss the SRP request. DMF also launched a website¹ to provide permitting guidance for Massachusetts aquaculture projects. However, given the large scope and scale of the SRP as originally contemplated and the lack of best management practices for newly emerging aquaculture activities, DMF, in consultation with EEA agencies, has requested that the Secretary establish a more focused SRP to streamline review of smaller shellfish aquaculture projects, while EEA agencies continue to consider a broader permitting framework for aquaculture activities. As noted, comments received on the draft SRP reiterated a desire to develop a broader permitting framework and associated MEPA review that would result in identification of best management practices for the industry. I established this SRP as a 1-year pilot and anticipated that data collected on shellfish aquaculture projects would be used by Participating Agencies in consideration of this broader effort.

Purpose of the SRP

DMF has requested that the Secretary establish this SRP pursuant to 301 CMR 11.09(4)(a) and (e). DMF engages in the certification of municipal licensing and permitting of shellfish aquaculture, along with various other state, local and federal agencies including the Massachusetts Department of Environmental Protection (MassDEP), the Natural Heritage and Endangered Species Program (NHESP), U.S. Army Corp of Engineers (USACE), and local Conservation Commissions. This SRP is proposed only for aquaculture activities associated with “Class 3 / Type 1” permits issued by DMF under 322 CMR 7.01(4)(c) and 322 CMR 15.04(1)(a)3. and 15.04(1)(b)1. (“Authorizes an open water system with minimal structures and no feeding” for “Shellfish”).

¹ <https://www.massaquaculturepermitting.org>

Under M.G.L. c. 130, § 57, a city or town, after public notice and hearing, may grant a shellfish aquaculture license to any person to undertake shellfish aquaculture activities at all times of the year in, upon, or from a specific portion of coastal waters of the Commonwealth, of tidal flats or land under coastal waters. The license may authorize the following activities: (1) to plant and grow shellfish, bottom/off bottom culture; (2) to place shellfish in or under protective devices affixed directly to the tidal flats or land under coastal waters, such as boxes, trays, pens, bags, or nets; (3) to harvest and take legal shellfish; (4) to plant cultch for the purpose of catching shellfish seed; and (5) to grow shellfish by means of racks, rafts or floats. The city or town may issue the license only after the DMF director certifies that “issuance of a shellfish aquaculture license and operation thereunder will cause no substantial adverse effect on the shellfish or other natural resources of the city or town.” Failure of the director to so certify is deemed a denial of the shellfish aquaculture license. Shellfish aquaculture licenses issued pursuant to M.G.L. c. 130, § 57 are subject to rules and regulations promulgated by DMF, and may be conditioned by DMF as the director deems necessary and appropriate.

DMF certifications under M.G.L. c. 130, § 57 (“Section 57 Certifications”) are deemed to be an “Agency Action” for purposes of MEPA review because they constitute a “permit, license, certificate, variance, approval, or other entitlement for use, granted by an Agency for or by reason of a Project.” 301 CMR 11.02 (definition of “Permit”). Specifically, they constitute, together with the municipal license, an “approval” and “entitlement for use” for a specific portion of coastal waters for purposes of carrying out shellfish aquaculture; failure of DMF to issue the certification is deemed a denial of the shellfish aquaculture license. Most aquaculture sites range from 0.5 to 2 acres in size, and utilize gear (cages or tents) that are removed seasonally and result in minimal, if any, permanent impact to land under coastal waters. Because these types of operations are expected to have minimal adverse effects on protected areas and resources, state authorizations are often limited to DMF’s Section 57 Certification and shellfish propagation permit. Projects that have the potential to result in greater or more permanent impacts, such as the placement of cultch directly on the ocean bottom and larger scale private aquaculture sites, often require additional state authorizations, including a M.G.L. c. 91 License and/or 401 Water Quality Certification (WQC) from MassDEP and, if federal permitting is required, a federal consistency determination from the Massachusetts Coastal Zone Management (CZM) office. If the site is located in mapped rare species habitat, it also requires additional consultation and/or permitting through NHESP.

This SRP is intended to increase the efficiency of MEPA reviews for aquaculture projects that require a DMF Section 57 Certification, but for which no other Agency Action independently triggers the need for MEPA review. For these smaller projects, with predictable and minimal individual impacts, DMF seeks an alternative, more efficient, MEPA review process. This SRP also seeks to ensure that the cumulative impacts of multiple projects proceeding in a similar time frame within the same embayment, including potential impacts to wetlands, eelgrass, rare species habitat, and navigable waters, can be reviewed through MEPA in coordination with Participating Agencies. This SRP was initially implemented as a 1-year pilot, and may be modified as appropriate after such period.

To facilitate MEPA review in accordance with this SRP, DMF has developed an Aquaculture Description Form (the “DMF Aquaculture Description Form”), to be submitted by the project proponent when requesting a municipal license and associated Section 57 Certification, for purposes of disclosing site-specific information about the proposed aquaculture activities, gear types, potential environmental impacts, and cumulative impacts when considering other similar activities proposed in the same

embayment during a similar time frame. The DMF Aquaculture Description Form will also be used to determine whether the project is subject to the size thresholds established under this SRP and/or may require Agency Actions other than the Section 57 Certification such that this SRP is not applicable. The form will solicit information related to the project's environmental impacts and benefits relative to Environmental Justice (EJ) populations.

SPECIAL REVIEW PROCEDURE

To effectuate the purposes set forth above, I previously established an SRP on September 9, 2022 to guide MEPA review of shellfish aquaculture projects authorized by DMF through a Section 57 Certification and a Class 3 / Type 1 propagation permit under 322 CMR 7.00 and 15.00. I find that this SRP serves the purposes of MEPA, including providing meaningful opportunities for public review, analysis of alternatives, and consideration of cumulative environmental impacts. The acreage of the entire project site will be considered for determining the applicability of the categories outlined below.

Project Sites of 10 or More Acres (≥ 10 acres)

Any shellfish aquaculture sites of 10 or more acres will not be subject to this SRP, and will be required to follow normal MEPA procedures. In most cases, these projects will trigger the 10 acre (EIR) threshold for alteration of "any other wetlands" under 301 CMR 11.04(3)(a)1.b.

Projects Sites of Greater than 2 acres but Under 10 Acres (> 2 acres but < 10 acres)

Shellfish aquaculture projects in this size range that require a DMF Section 57 Certification, but no other Agency Actions, are eligible for the MEPA review procedures as described in this SRP. Shellfish aquaculture projects in this size range that require another Agency Action (in addition to DMF's Section 57 Certification) are not eligible for the MEPA review procedures described in this SRP and must undergo normal MEPA procedures.

If no other Agency Action has been identified for the project other than the DMF Section 57 Certification, projects that are greater than 2 acres but under 10 acres in size shall be permitted to file a copy of the DMF Aquaculture Description Form and DMF's conditional certification letter (the "MEPA Aquaculture Filing") to the MEPA Office in lieu of filing an Environmental Notification Form (ENF). The DMF Aquaculture Description Form shall attach a cumulative impacts summary, described in Part IV below. The MEPA Aquaculture Filing shall be published in the Environmental Monitor for a 20-day comment period, and the Secretary shall issue a Certificate within 10 days thereafter determining whether further review is warranted. If no review is required, the Certificate shall determine that the filing adequately and properly complies with MEPA and its implementing regulations. The Secretary may establish a standard format for such Certificates. If, based on comments received and consultation with Agencies, the Secretary determines that further review is warranted, the Secretary may issue a Scope for a Draft or Single Environmental Impact Report (EIR).

For any project located within 1 mile of an EJ population, the project proponent shall also include in the MEPA Aquaculture Filing, as an attachment to DMF Aquaculture Description Form, a supplement containing information describing the surrounding EJ populations and disclosing potential environmental impacts and benefits for such populations. The MEPA Office may provide a standard

form to be used for this purpose, and such form shall be attached to the DMF Aquaculture Description Form. Projects subject to this SRP shall be exempt from the requirements of 301 CMR 11.05(4), and I hereby find that the standards for a waiver under 301 CMR 11.11(1) are met in light of the burden posed to proponents and the minimal anticipated impacts of the projects that will be subject to this SRP. Notice of this SRP was provided on July 22, 2022 by DMF to a list of community-based organizations (CBOs) and tribes/indigenous organizations provided by the MEPA Office in consultation with the EEA EJ Director.

Projects Sites of 2 or Less Acres (≤ 2 acres)

If no Agency Action other than the Section 57 Certification independently triggers the need for MEPA review, projects that are 2 or less acres in size shall be exempt from any MEPA filing requirement. This provision does not exempt the project from other state permitting requirements that may apply to projects of any size, including a MassDEP c. 91 license, 401 WQC, and consultation and/or “take” permit from NHESP under the Massachusetts Endangered Species Act (MESA).²

Cumulative Impacts

Upon conditional certification of a license site, DMF shall coordinate with all project proponents to provide a cumulative impacts summary that addresses other similar aquaculture activities existing and/or proposed within the same embayment during a similar time frame to include with the DMF Aquaculture Description Form. Specifically, such information shall identify other existing and conditionally certified aquaculture sites, gear types, and acreage within the same embayment (contiguous waterbody) as the proposed site. DMF shall determine the appropriate form to record this information, and shall direct the proponent to include this information in the DMF Aquaculture Description Form. The Secretary’s determination as to whether further MEPA review is required under Part II above shall consider the cumulative impacts of the proposed project in combination with other aquaculture projects proposed within the same embayment within a similar time frame.

Circulation Requirements

Each review document submitted under this SRP must be circulated in accordance with 301 CMR 11.16. Public notice under 301 CMR 11.15(1) is not required.

If a full ENF is required for any projects subject to Part I-IV above, the Proponent must comply with all requirements set forth in 301 CMR 11.00 and associated policies and protocols.

Term of SRP and Modification

This 1st amended SRP shall expire on January 15, 2024, unless extended or modified by agreement of the Parties. If DMF wishes to change any provision in this SRP, it may submit correspondence requesting modification of the SRP. The Secretary will then review the request and issue a further amendment to the SRP if appropriate.

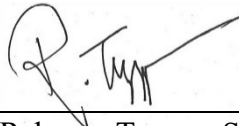
²All projects located in designated priority habitat for state-listed species according to the Massachusetts Natural Heritage Atlas, must file with the Natural Heritage and Endangered Species Program (NHESP) pursuant to the MA Endangered Species Act (MESA), regardless of project size.

Conclusion

The signatures below indicate consent to the establishment of a Special Review Procedure and the provisions outlined in this 1st amended SRP. In addition, DMF shall obtain, through the DMF Aquaculture Description Form, a signed acknowledgment and agreement to follow these SRP procedures by individual project proponents.

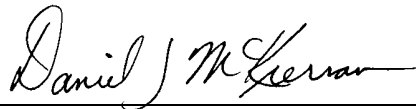
September 12, 2023

Date



Rebecca Tepper, Secretary
Executive Office of Energy and Environmental AffairsSeptember 11, 2023

Date



Dan McKiernan
Division of Marine Fisheries

Comments received on the draft SRP (published for comment on August 10, 2022):

08/18/2022	Michael Tlusty
08/29/2022	Provincetown Shellfish Department
08/30/2022	MassAudubon
08/30/2022	The Nature Conservancy
08/30/2022	Wellfleet Shellfish Constable
08/30/2022	Massachusetts Bays National Estuary Partnership