



David E. Pierce
Director

Commonwealth of Massachusetts

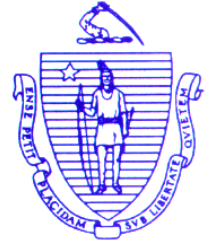
Division of Marine Fisheries

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August 19, 2019

Carlton Hendricks III
165 Ningret Avenue
Mashpee, MA 02645

Re: ***Matter of Hendricks***, Docket No. SSW-175920-DM-18
FINAL DECISION

Dear Mr. Hendricks:

I have thoroughly reviewed the hearing record in this matter and the Recommended Final Decision of the Magistrate. Based on this record, I have concluded that you harvested shellfish from an area closed to commercial harvest due to contamination, attempted to sell these contaminated shellfish into commerce, and attempted to conceal that the shellfish came from contaminated waters by misrepresenting the harvest area on your shellfish tags. These represent violations of the state's sanitary shellfish regulations that place the public's health at a substantial risk. Moreover, such actions can undermine consumer confidence in Massachusetts shellfish and harm the reputation of the state's shellfish industry.

Accordingly, my **FINAL DECISION** follows:

1. The Division of Marine Fisheries will not reinstate, renew, issue or reissue you a commercial shellfish permit until no sooner than January 1, 2022,
2. Upon reinstatement and reissuance, your commercial shellfish permit shall be subject to a three-year probationary period whereby any violation of the state's marine fishery laws and regulations shall result in an immediate suspension of the commercial fishing permit and an adjudicatory proceeding to show cause as to why the permit shall not be permanently revoked.

Therefore, your shellfish and seaworms permit DMF ID No. 175920 remains suspended through December 31, 2021, and upon reissuance thereafter is subject to a three-year probationary period. You may not apply for, hold or otherwise be issued any permit, authorization or regulated fishery permit for shellfish until January 1, 2022. Any such permit, authorization, or regulated fishery for shellfish that may inadvertently or mistakenly be issued to you shall be null and void.

This **FINAL DECISION**, is consistent with the recommendation set forth in the Magistrate's Recommended Final Decision to "not reinstate, renew, issue or reissue commercial shellfish permit to the respondent for a period of no less than one year from the date of the Director's Final Decision in this proceeding."

You have the right to seek judicial review of my decision in the Superior Court pursuant to G.L. c. 30A, §14(1). The complaint must be filed in Superior Court within thirty days of receipt of this decision.

Sincerely Yours,

A handwritten signature in cursive script that reads "David E. Pierce". The signature is fluid and elegant, with the first and last names being more prominent.

David E. Pierce, PhD
Director

Attachments:

Recommended Final Decision
Docket Sheet

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF FISH AND GAME
DIVISION OF MARINE FISHERIES

SUFFOLK, SS.

ADJUDICATORY PROCEEDING
DOCKET NO. SSW-175920-DM-18

IN THE MATTER OF:

CARLTON HENDRICKS, III and
SHELLFISH and SEAWORM PERMIT
#175920 and SHELLFISH TRANSACTION
CARD

Respondent

RECOMMENDED FINAL DECISION*

BACKGROUND

This proceeding was initiated by the claimant Division of Marine Fisheries (“DMF”) pursuant to an Order to Show Cause and Notice of Automatic Permit Suspension. The respondent is Carlton Hendricks III, a member of the Mashpee Wampanoag Tribe (“Wampanoag”). The Claim for an Adjudicatory Proceeding is based on a law enforcement report submitted by the Massachusetts Environmental Police (“MEP”). The report charges that on or about August 8, 2018, respondent engaged in the unlawful harvest of shellfish from the tidal waters and flats of Great Pond in Falmouth. At that time Great Pond was CLOSED-TO-SHELLFISHING from May 1, 2018 to October 31, 2018 due to seasonal pollutants.

An adjudicatory hearing was held on August 29, 2018 in accordance with the G.L. c.30A, §§10-14, and pursuant to the Standard Rules of Adjudicatory Practice and Procedure, 801 CMR 1.00, et. seq. Respondent was represented by his authorized representative, Carlton Hendricks, Jr., his father, and a Tribal official (“Mr. Hendricks”). The claimant was represented by DMF Deputy Director Daniel McKiernan. The hearing was electronically recorded. The oath was administered to those who testified.¹ At the conclusion of the testimony, a record of the proceeding was compiled. Mr. Hendricks requested that the record remain open to file copies of legal documents relative to the Tribal status of the Mashpee Wampanoag and the rights of

* For expedited hearings, a category that this case falls into, I strive to issue Recommended Final Decisions as expeditiously as possible. However, personal health issues and a death in my immediate family delayed the timely completion of this decision.

¹ Respondent exercised his right not to testify. No inferences are drawn from respondent’s exercise of his right.

respondent as a native American and Wampanoag Indian to harvest shellfish in Massachusetts without a permit for personal consumption or family sustenance.²

Mr. Hendricks filed a written document entitled "AFFIDAVIT". It is included in the administrative record of this proceeding. It was also read into the record at the hearing's conclusion as part of Mr. Hendricks' summation. The evidentiary value of this document is discussed on page 12, *infra*.

This is a Recommended Final Decision ("RFD") issued by an Administrative Law Magistrate in accordance with the relevant provisions of G.L. c.30A, §11, and pursuant to 801 CMR §1.01(11). The respondent requested, and was granted, an additional thirty days to file comments to the Tentative Decision. Responses to the written comments filed on behalf of respondent are contained within this RFD in the appropriate section(s).

INTRODUCTION

The primary questions to be answered in this proceeding are: (1) whether respondent harvested, possessed and transported shellfish taken from an area classified CLOSED-TO-SHELLFISHING by the Director; (2) whether respondent failed to tag harvested shellfish prior to removal from the shellfish area; and (3) whether respondent when asked by MEP to tag his shellfish did so by providing false and incomplete information.³ For the reasons set forth below, the answer to these three questions is yes.

An administrative hearing was conducted in the course of this proceeding. Administrative due process, and hearing practices and procedures required for an agency adjudicatory hearing were applied.⁴ The claimant's burden of proof is by the "clear weight" or a "preponderance" of the "credible" evidence. The regulations respondent is charged with violating, 322 CMR 16.00, are based on a federal model ordinance (regulation) of the United States Food and Drug Administration, National Sanitary Shellfish Program ("federal NSSP"). Federal NSSP sanitary regulations are adopted and enforced by coastal states, including Massachusetts, who participate in the NSSP. The DMF sanitary shellfish regulations are codified at 322 CMR 16.00. They

² Administrative notice is taken of the recognition by the United States of the Mashpee Wampanoag's as a federally recognized Tribe, as well as the Commonwealth's recognition of native American rights to shellfish in Massachusetts without a permit for personal consumption or family sustenance. I allowed Mr. Hendricks' request to keep the record open for ten days to allow him to file copies of public records of the Massachusetts Executive and Legislative branches of government that recognize native American aboriginal shellfish rights in Massachusetts.

³ See Order to Show Cause, *Matter of Hendricks*, August 13, 2018, and MEP law enforcement report #18-160-AR for a complete list of charges. In addition, Respondent's permit was immediately suspended pursuant to the Director's Notice of Immediate Suspension of Commercial Shellfish Permit, August 13, 2018. Agencies may suspend a professional license or permit prior to a hearing, where there is a threat to the public health, welfare or safety. G.L. c. 112, §52F; *Levy v. Board of Registration in Dentistry*, 2007 WL 6823651 (Mass. App. Ct. July 10, 2007). See also G.L. c.130, §80 and 322 CMR §16.06.

⁴ Administrative due process and adjudicatory hearing procedures are not the same as those applied to civil or criminal judicial proceedings. Massachusetts Appellate Courts "have treated the procedural due process protections of the Massachusetts and United States Constitutions identically." *Liability Investigative Fund Effort, Inc. v. Massachusetts Med. Professional Ins. Ass'n*, 418 Mass. 436 (1994). *Duarte v. Commissioner of Revenue*, 451 Mass. at 412; *Matter of Angela*, 445 Mass. 55, 62 (2005) ("The fundamental requirement of due process is notice and the opportunity to be heard at a meaningful time and in a meaningful manner.").

prohibit the harvest of shellfish from areas classified by DMF as CLOSED-TO-SHELLFISHING due to seasonal water quality conditions that deteriorate due storm-water runoff, pollutants or bio-toxins. Seasonal pollutants may be caused by an increase in summer population and activities, or accidental oil spills or chemical contamination.⁵ For the purpose of protecting the public health, welfare and safety from the commercial sale of tainted shellfish, they establish 'sanitary' requirements for persons harvesting 'wild' shellfish.⁶

FINDINGS OF FACT

Based on the administrative record compiled at the conclusion of the hearing, the post-hearing documents filed by Mr. Hendricks, and the written comments to the Tentative Decision, I hereby find the following facts:

(1) Respondent is the holder of a 2018 commercial shellfish and seaworm permit DMF ID. No.175920 with a shellfish endorsement and a shellfish transaction card ("the permit") issued by the Director of DMF. (Claimant's exhibit 1).⁷

(2) On January 18, 2018, the Director attached to all commercial shellfish permits, and provided to all commercial shellfish permit holders including respondent, a written Statement of Permit Conditions for Shellfish Harvest, Handling, Transport and Sale.⁸

(3) On May 1, 2018, DMF established a seasonal closure of Great Pond in Falmouth by classifying the area CLOSED-TO-SHELLFISHING from May 1, 2018 to October 31, 2018 due to seasonal pollutants. (Claimant's exhibit 5).

(4) Great Pond is designated by DMF as Shellfish Area SC:11.3, and defined "as the waters, flats and all tributaries of Great Pond in the Town of Falmouth north of a line drawn

⁵ In this context the term 'wild' shellfish is used to distinguish it from cultivated shellfish. The enabling authority for the promulgation of the federal NSSP regulations is contained in G.L. c.130, §74 which provides in relevant part: "[t]he division of marine fisheries ... can promulgate rules and regulations establishing standards and criteria for the classification of all shellfish growing areas within the commonwealth. Such standards and criteria shall conform at a minimum to those established by the national shellfish sanitation program."

⁶ During the hearing both Mr. Hendricks and Mr. Tobey acknowledged that this case does not involve aboriginal rights of native Americans to harvest shellfish without a DMF permit for personal consumption or family sustenance as exercised by a Wampanoag Tribal member. Both also acknowledged that the federal NSSP program and regulations implemented by the Commonwealth, while not conservation based, are public health based, and apply to all persons including the Mashpee Wampanoag.

⁷ Claimant's exhibit 1 is the DMF permit inventory of respondent. The permit inventory shows that respondent was issued a commercial shellfish permit in 2016 and 2018, a fact which speaks to Mr. Hendricks' closing remarks that respondent depends on commercial shellfish digging for his livelihood. Respondent is a relatively new commercial harvester of shellfish in Massachusetts.

⁸ The Director's Statement restricted respondents permit to harvest shellfish only from areas classified as "OPEN" and further stated the following: "Shellfish for direct marketing shall only be harvested from [shellfish areas] classified as **Approved** or **Conditionally Approved** by DMF and in the '**Open Status**'. Information regarding shellfish classification [areas] ... may be found on the Division's Shellfish Classification Area webpage ... and Legal Notice webpage. Harvesters are advised to consult with local shellfish authorities or DMF to determine which [shellfish areas] are OPEN [and safe for harvesting] and which shellfish areas are CLOSED to harvesting [to] protect public health due to sanitary problems." (Claimant's exhibit 3).

across the mouth of the pond and south of a line drawn across the mouth of Perch Pond and south of a line drawn west of Dexter Mill Drive to Veeder Drive". (Claimant's exhibit 4).

(5) By written notice dated April 30, 2018, the Director informed the Falmouth Selectman and the Falmouth Shellfish Constable of the seasonal closure of Great Pond to the harvest of shellfish. (Claimant's exhibit 5).

(6) Notice of the Director's written commercial shellfish permit conditions was provided to respondent along with the 2018 permit, and publicized by e-list mailing, on the DMF website notice, and by letter to the Falmouth Board of Selectmen and the Falmouth Shellfish Constable. (Claimant's exhibit 3).⁹

(7) Falmouth maintains and provides updated information on all shellfish areas that are opened or closed to shellfish digging in the Town. (Martinson testimony. Claimant's exhibit 6).¹⁰

(8) On or about August 8, 2018, the Falmouth Department of Marine and Environmental Services ("FMES") received an anonymous tip that an unidentified person was, and had been, digging and taking shellfish from Great Pond in the Town of Falmouth. (Martinson testimony. Claimant's exhibit 6).

(9) Based on the anonymous tip, Falmouth Shellfish Constable Martinson proceeded to Great Pond where he observed an individual, later identified as Carlton Hendricks III, digging shellfish with a clam rake from the waters and flats of Great Pond, placing the harvested shellfish in two orange bushel baskets, and carrying the baskets of shellfish from the flats to a waiting Green Chevrolet, K1500 pickup truck with MA.Reg. 8PG375 ("pickup truck"). (Martinson testimony. Claimant's exhibit 6).

(10) Constable Martinson observed respondent place the two orange baskets in the pickup truck and followed the truck directly to the Falmouth Fish Market ("the market"). (Martinson testimony. Claimant's exhibit 6).

(11) At that moment, Constable Martinson radioed MEP Lieutenant Matthew Bass to meet him at the market location. (Martinson testimony. Claimant's exhibit 6).

(12) Constable Martinson continued to observe as respondent carried the two orange bushel baskets of shellfish from the pickup truck into the service entrance of the market. (Martinson testimony. Claimant's exhibit 6).

(13) Lieutenant Bass arrived, and with Constable Martinson, entered the market through the service entrance and saw the owner counting out quahogs from the two orange bushel baskets. (Bass testimony. Claimant's exhibit 7).¹¹

⁹ See Conclusions of Law #11 and note 16, p.7, *infra*.

¹⁰ The Town publicizes the digging status of all shellfish areas at its four public libraries, at all local wholesale seafood dealers, and in five individual kiosks throughout the Town. During the summer, the FMES is staffed from 8:00 am to 8:00 pm to provide and assist shellfish diggers with information on precisely where they may and may not dig within the Town. (Martinson Testimony).

(14) The owner of the market told Lieutenant Bass that respondent had just brought the two orange bushel baskets of quahogs into the market for sale. (Bass testimony. Claimant's exhibit 7).

(15) In response to a question from Lieutenant Bass, respondent replied that he had harvested the quahogs from Waquoit Bay. (Bass Testimony. Claimant's exhibit 7).¹²

(16) Respondent had not completed the DMF shellfish identification tags with the required information and there were no such tags affixed to the two orange bushel baskets of quahogs. (Bass Testimony. Claimant's exhibit 7).¹³

(17) In response to Lieutenant Bass' question about the tags, respondent took two blank tags from the market and partially completed the information required for on shellfish tags including the area where the shellfish was harvested from - which respondent wrote as SC:15. (Bass testimony. Claimant's exhibit 9).

(18) The purposes of 322 CMR 16.00, Shellfish Sanitation, Harvest, Handling and Management, are model regulations of the federal NSSP, implemented by the Commonwealth, and designed to protect the public health, welfare, and safety from unknowingly consuming tainted shellfish, as well as tracking the origins of shellfish that enter intra and inter-state commerce.¹⁴

(19) On February 28, 2018 respondent signed the DMF Shellfish Harvesting, Handling and Transport Affidavit as a condition to the issuance of the permit. (Claimant's exhibit 2).

(20) The provisions of 322 CMR 16.00 and the Director's January 2018 conditions and restrictions applicable to the use of the permit issued to respondent, a native American Wampanoag Indian of the Mashpee Tribe, are essential and non-discriminatory requirements that are necessary for protection of the public health, welfare, and safety.

¹¹ G.L. c.130, §1 defines quahogs as "a marine mollusk of the species *Venus mercenaria* commonly called the hard-shell clam." Shellfish is defined to include "clams ... quahogs ... sea clams ... sea quahogs". *Id.*

¹² Waquoit Bay, shellfish Area SC15 is classified by DMF as OPEN to the commercial harvest of shellfish. See DMF classification of shellfish areas at <https://www.mass.gov/service-details/shellfish-classification-areas>. (Claimant's exhibit 7).

¹³ 322 CMR §16.03(1).

¹⁴ The sanitary harvest and sale of shellfish is a primary responsibility of DMF. The sanitary shellfish regulations protect the public from unknowingly consuming tainted or contaminated product. Contamination is no longer defined by just fecal coliform counts, but now includes a broad array of unsanitary conditions caused by storm water runoff, pollutants, bio-toxins, oil spills, chemicals, red tide, *Vibrio* bacteria, and other pathogens which can cause norovirus, hepatitis, and cholera. 322 CMR 16.00 are public health, welfare and safety regulations based on the federal NSSP model sanitary shellfish regulations. The Commonwealth participates in the US Department of Food and Drugs, NSSP program and is required to implement the federal NSSP model sanitary shellfish regulations in order to continue participating in the federal program. The sanitary shellfish regulations apply *of necessity* to all persons in a non-discriminatory fashion, including native Americans in Massachusetts, seeking to harvest shellfish for commercial purposes under authority of a commercial shellfish permit. See <https://www.mass.gov/service-details/learn-about-shellfish-sanitation>. 322 CMR §16.01. (Claimant's exhibit 3).

CONCLUSIONS OF LAW

(1) The Mashpee Wampanoag are a federally recognized Tribe in accordance with the provisions of the Federal Non-Intercourse Act.

(2) Native Americans in Massachusetts, including Wampanoag and Mashpee Wampanoag Tribal members have the right to harvest shellfish without a DMF permit for personal consumption and family sustenance.

(3) It is unlawful to harvest, possess, transport, or sell shellfish taken from a shellfish area classified by DMF as CLOSED-TO-SHELLFISHING in violation of 322 CMR §16.04(2).

(4) It is unlawful to harvest, possess, transport or sell any shellfish without having in possession a commercial shellfish permit and a shellfish transaction card in violation of the provisions of G.L. c.130, §80 and 322 CMR §7.10(14)(g).

(5) It is unlawful to possess, transport or sell any shellfish that is not affixed with a shellfish identification tag fully and accurately completed with the information required by 322 CMR §16.03(1)(a)(2) in violation of G.L. c.130, §81.¹⁵

(6) It is unlawful for any person harvesting shellfish for commercial purposes to complete a shellfish identification tag with false information in violation of 322 CMR §16.03(1).

(7) It is unlawful for any person to not comply with the requirements set forth in the DMF Shellfish Harvesting, Handling, and Transportation Affidavit signed by such person.¹⁶

(8) It is unlawful for any person to sell or attempt to sell shellfish without the authorization of a DMF shellfish transaction card as required by 322 CMR §7.01(2)(k).

(9) It is unlawful for any person to violate any provision of G.L. c.130 or 322 CMR when conducting a marine fishery activity authorized by a permit.

(10) It is unlawful for any person to harvest, possess, transport or sell shellfish without being in possession of a DMF commercial shellfish permit and transaction card as required by G.L. c.130, §80 and 322 CMR §§7.10(14)(g) and (f).

¹⁵ Tags used to trace the origins of shellfish must be completed by the harvester attached to the containers of shellfish *before* he or she removes the shellfish from the shellfish area for transport. See note 15, below.

¹⁶ As a condition to the issuance of the permit respondent signed a DMF affidavit setting forth the requirements, responsibilities and duties of a shellfish harvester. (Claimant's exhibit 2). The affidavit, permit conditions and regulations require all permitted shellfish harvesters to (a) use a tag that is not made of durable and waterproof material; (b) use a tag that is less than 13.8 square inches in size, or less than 2 $\frac{5}{8}$ " by 5 $\frac{1}{4}$ "; (c) use a tag that does not have legibly written on it in indelible ink, the full name of the harvester; the harvesters commercial shellfish permit DMF ID number; the date and time of harvest; the type and quantity of shellstock; the initials of the state where harvested from; the name, designation and classification of the shellfish area where harvested from; and the statement 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". (322 CMR §16.03(1)(a)).

(11) The Director is authorized by 322 CMR §7.01(7) to attach written conditions or restrictions to any permit he issues deemed necessary or appropriate for the protection of the public health, welfare, and safety from consuming tainted shellfish.¹⁷

DISCUSSION

Respondent is charged in this proceeding with harvesting shellfish from an area classified by DMF as a CLOSED-TO-SHELLFISHING shellfish area not OPEN to the harvest of shellfish in violation of the sanitary shellfish regulations, 322 CMR 16.00. What sets this case apart from other similar agency administrative permit proceedings for violation of the sanitary shellfish regulations is that respondent is a native American and member of the Mashpee Wampanoag Tribe. As such, respondent has certain fundamental aboriginal rights to harvest shellfish for personal consumption or family sustenance without a permit. Those fundamental rights are not, however, impacted by the Commonwealth's sanitary shellfish regulations but rather coexist with them. Similar to the application of a state's conservation based shellfish regulations to federally recognized Indian Tribes, is the application of a state's public's health and safety based shellfish regulations. Both conservation based and public health and safety based shellfish regulations apply to native Americans in Massachusetts and the Mashpee Wampanoag Tribe.¹⁸

Native American Rights. The United States recognizes the Mashpee Wampanoag as a Tribe pursuant to the federal Non-Intercourse Act.¹⁹ The Commonwealth has continuously recognized "aboriginal" (original) rights of native Americans in Massachusetts to harvest shellfish without a permit for personal consumption and family sustenance. At one time, the General Court explicitly recognized by statute an exemption from the individual shellfish permit requirement for native Americans in Massachusetts.²⁰ Aboriginal rights to harvest shellfish for personal sustenance inure to the benefit of respondent who is a Wampanoag Indian. These historical rights were recognized by Great Britain in pre-revolution days. Aboriginal rights to shellfish are in no way commercial or commercially oriented rights.²¹

¹⁷ *Sea Rover Fishing, Inc. and others v. Paul Diodati as Director of Division of Marine Fisheries*, Suff.Sup.Ct., C.A. No. 08-1106-BLS2 (2008) (in an action for declaratory judgment the Superior Court upheld the validity of 322 CMR §7.01(7) which authorizes the Director to establish fishing permit conditions, holding that the permit conditions established are not the same as a regulation, and do not require a public hearing or comment period).

¹⁸ *Washington Game Dept. v. Puyallup Tribe*, 414 U.S. 44 (1973) (states may apply conservation based shellfish regulations to native American Tribal members. See also *Antoine v. Washington*, 420 U.S. 194 (1975). *Confederated Tribes of the Coleville Reservation v. Anderson*, 761 F.Supp.2d 1101 (E.D.Wash.2011) (states may impose public safety regulations to Indian fishery harvesters provided there is a demonstrable public safety threat).

¹⁹ *Mashpee Tribe v. New Seabury Corporation*, 592 F.2d 575 (1st Cir.1979).

²⁰ For example, St.1795, c.71, §5 provided that "nothing in this Act shall extend to deprive any native American of the privilege in digging shellfish for their own consumption" ... "[A]ny Native Indians without a permit, may ... take for his own family use, from the waters of any city or town ... soft-shelled clams". Acts of 1795, c.71, §5; Rev.St.1836, c.55, §15; St.1941, c.598, §1; St.1933, c.329, §50. During the 1941 process of recodifying the General Laws, that portion of the statute exempting native Americans from the permit requirement to harvest shellfish for family sustenance was inexplicably omitted. There also exist two pre-revolutionary treaties raised by respondent in his comments to the Tentative Decision. In *Maxim*, the Court decided the matter based in part on the Treaty of Falmouth of 1727, the Treaty of Falmouth of 1749, as well as the numerous Executive and Legislative recognitions of these aboriginal shellfish rights.

²¹ Governor's Executive Order No. 126 (July 8, 1976). Resolution of the Massachusetts House of Representatives (November 9, 1982). In a Memorandum of Understanding between DMF and the Mashpee Wampanoag Tribe, DMF agreed not to enforce its ban on the taking of river herring against members of the Tribe.

The seminal case on this issue is *Commonwealth of Massachusetts v. Michael J. Maxim*, 429 Mass. 287 (1999). The *Maxim* case began as a District Court criminal conviction of a Wampanoag Indian found guilty of harvesting shellfish in violation of a Town's recreational shellfish regulation. On appeal, the Massachusetts Appeals Court in *Commonwealth v. Maxim*, 45 Mass. App. Ct. 49 (1998), noted with some frustration that "[t]his dispute, which would have been ideally suited for resolution in a civil action styled as a request for declaratory relief, has been inartfully forced into a criminal proceeding ..." The Court went on to reverse the District Court's conviction based on the prosecutions failure to meet its heavy burden of proof - beyond a reasonable doubt. The Court reviewed the Commonwealth's history of native American aboriginal rights to shellfish without a permit for personal consumption and family sustenance.²²

On further review, the Supreme Judicial Court agreed with the Appellate Court's reversal but on different grounds.²³ The following language from the SJC's decision continued to confirm native American sustenance and treaty rights in Massachusetts, notwithstanding the 1941 statutory recodification that omitted the statute exempting native Americans from the permit requirement to harvest shellfish for personal consumption and family sustenance.

"It is doubtful, however, by the omission, that the Legislature intended to modify or to revoke aboriginal rights recognized in the Commonwealth for hundreds of years. Cf. *United States v. Santa Fe Pac. R.R.*, supra at 354 ("an extinguishment [of aboriginal title] cannot be lightly implied in view of the avowed solicitude of the Federal government for the welfare of its Indian wards"). This is particularly so where there is subsequent executive and legislative action that indicates that such omission was never intended. See *Confederated Tribes of Chehalis Indian Reservation v. State*, 96 F.3d 334, 340 (9th Cir.1996) ("Courts have uniformly held that treaties, statutes and executive orders must be liberally construed in favor of establishing Indian rights Any ambiguities in construction must be resolved in favor of the Indians." [Citations omitted]. Furthermore, as the Appeals Court correctly noted, the record in this case demonstrates "a long history of recognition of the fishing rights of native Americans by the Commonwealth and a lack of showing that the Commonwealth intended to authorize the town to restrict such rights."²⁴

²² *Commonwealth v. Michael J. Maxim*, 45 Mass.App.Ct. 49, 51 (1998). The Appeals Court considered the General Court's omission of the statutory permit exemption of native American's right to shellfish for family sustenance "a small matter when it comes to the extensive executive orders, agency agreements, and legislation" which continued to recognize the "special status of Indians within the state." *Id.*

²³ "[I]t is a basic principle of our criminal law that ambiguities and doubts are to be resolved in favor of defendant. *Commonwealth v. Hrycenko*, 417 Mass. 309, 317 (1994). The regulation cannot be applied against the defendants in these circumstances. It is a central tenet of our constitutional law that, as a matter of due process, a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden should be deemed void for vagueness. *Commonwealth v. Kwiatkowski*, 418 Mass. 543, 547 (1994), quoting *Opinion of the Justices*, 378 Mass. 822, 826 (1979). *Commonwealth v. Williams*, 395 Mass. 302, 304 (1985) ('As these cases involve a criminal charge, ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity')." .

²⁴ *Commonwealth v. Maxim*, 429 Mass. 287, 291 (1999).

Nowhere in the Tentative Decision or in this Recommended Final Decision is it suggested that respondent's application for, and issuance by the Director of a commercial shellfish permit and transaction card has any affect whatsoever on respondent's native American rights to harvest shellfish without a DMF permit for personal consumption or family sustenance.²⁵ It is well founded in the Commonwealth that the Mashpee Wampanoag have never relinquished their aboriginal rights to shellfish without a DMF permit for personal consumption or family sustenance.

However, contrary to respondent's view, native American rights in Massachusetts to harvest shellfish without a DMF permit for personal consumption or family sustenance in no way include commercial rights such as selling, bartering, exchanging or trading the shellfish so harvested. Mr. Hendricks cites no federal case law to support this view. To the contrary, Mr. Hendricks requested in his closing remarks that the Director re-issue a commercial shellfish and seaworm permit and transaction card to respondent because commercial harvesting of shellfish is necessary for respondent's continued livelihood.²⁶

Sanitary Shellfish Regulations. The General Court provided DMF with enabling authority to promulgate regulations at 322 CMR 16.00 for the specific purpose of implementing the federal NSSP's model shellfish regulations. The NSSP Guide for the Control of Molluscan Shellfish establishes the minimum requirements that states have agreed to enforce through their participation in the Interstate Shellfish Sanitation Conference (ISSC), for the sanitary control of shellfish produced from the states to ensure that they are safe for human consumption.²⁷ The actions required of the states by the federal NSSP regulations include administrative classification of all shellfish areas to prevent the harvest of shellfish exposed to contaminants, pollutants or marine biotoxin events, and provide for the expeditious recall of nonconforming shellfish product.²⁸ The Commonwealth's sanitary shellfish regulations clearly place a public health duty and obligation on all commercial harvesters, which includes respondent, to comply with requirements designed to ensure that shellfish they harvest, possess and transport to the point of first sale comes from an area that is classified as OPEN to the commercial harvest of

²⁵ The aboriginal rights of the Mashpee Wampanoag Tribe to harvest shellfish without a DMF permit for personal consumption or family sustenance does not include any rights to sell, barter, exchange or trade such shellfish. The twist on these rights as offered up by respondent in his comments to the Tentative Decision are unsupported and if applied would stand this case on its head.

²⁶ Respondent is in the business of selling shellfish harvested from coastal tidal waters and flats. If the Commonwealth's shellfish conservation regulations apply to respondent, a priori its sanitary shellfish regulations do as well. *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165 (1977) (a state's reasonable and necessary conservation regulations applied to non-Indians may also be applied in a non-discriminatory fashion to Indians notwithstanding the existence of aboriginal fishing rights). *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 668 F.Supp.1233 (W.D.Wis.1987) (state must establish a need to restrict the take and that the regulation is necessary to accomplish that need). *United States v. Oregon*, 769 F.2d 1410 (9th Cir.1985) (the state regulation must be least restrictive alternative).

²⁷ See 322 CMR §16.02 for the definition of the NSSP model ordinance. <https://www.fda.gov/food/federalstate-food-programs/national-shellfish-sanitation-program-nssp>. Under international agreements with FDA, foreign governments also participate in the NSSP. In 2017, NSSP revisions to its model ordinance were adopted by DMF as amendments to 322 CMR 16.00; see <https://www.fda.gov/media/117080/download..>

²⁸ 322 CMR §16.01.

shellfish.²⁹ To accomplish this, commercial harvesters must know the classification of shellfish areas they harvest from before harvesting.³⁰

Commercial shellfish harvesters are singularly able to ensure that the shellfish they bring to market originates from areas classified by DMF as OPEN to the commercial harvest of shellfish. Additionally, for purposes of shellfish traceability, all harvesters are required to complete and affix tags to their shellfish containers, before they remove the shellfish from the digging area. From a public safety standpoint accurate and complete shellfish tagging allows the appropriate agencies to trace the origin of any tainted shellfish that reaches the marketplace or is found in interstate commerce for purposes of immediate public notice and recall.

All shellfish harvesters are expected to be informed and knowledgeable of these requirements. They are held to a high standard given the public health status of the regulations. As a condition to the issuance of a commercial shellfish permit, the applicant signs an Affidavit of Compliance wherein they are made aware of the sanitary shellfish regulatory requirements applicable to commercial shellfishing and commit themselves to full compliance. The harvester is a partner, if you will, with the FDA, NSSP, DMF, DPH and municipal shellfish authorities. DMF, and in this case Falmouth, provide the harvester with ample tools and opportunities to stay up to date with, and knowledgeable of the most recent classifications of shellfish areas from which they may commercially harvest shellfish.

Technological advances in computers, laptops, tablets and smart phones - even AI home assistant devices such as Alexa, Cortana or Siri - are all available for use in keeping the shellfish harvester knowledgeable and informed about shellfish area classifications and seasonal classifications. There are, however, simpler and more cost-effective methods including electronic mail and postal mailing notification lists offered by DMF to provide harvesters with the classification status of shellfish areas, including maps and charts showing their locations and precise boundaries.³¹ The Town of Falmouth makes the same shellfish harvesting information available at public kiosks, in public buildings and at the offices of FMES. A harvester need only ask the local shellfish constable, assistant constables, shellfish officers, environmental police officers or call DMF's shellfish offices in New Bedford and Gloucester or DMF's main headquarters in Boston to confirm the classification status of a shellfish area in Massachusetts.³²

There is no reasonable explanation as to why or how respondent shellfish harvester, especially a Wampanoag Tribal member with an address in Mashpee just a few minutes' drive

²⁹ The public health threat to any person who consumes tainted shellfish is significant and serious depending on the contaminant. Shellfish exposed to polluting runoff, bio-toxins, oil spills, chemicals, red tide, *Vibrio* bacteria, and other pathogens can cause norovirus, hepatitis, and cholera – serious illnesses that could lead to death. *Matter of White*, Docket No.SPP-156387-LE (2016) (illness caused by the bacterium *Vp* from ingestion of raw oysters by guests at a wedding reception).

³⁰ 322 CMR §7.01(5)(g).

³¹ DMF maintains an e-list of harvesters who ask that their email address be on the list that receive all shellfish related notices, actions, area classifications and re-classifications in real-time.

³² As an example, DMF operates and updates on a daily basis a shellfish closure hotline for North Shore biotoxin closures and the conditional restrictions of designated shellfish areas that are subject to rainfall contamination from runoff. Harvesters may call (978) 282-0308. <https://www.mass.gov/service-details/shellfish-classification-areas>.

from Falmouth, could be unaware of the classification status of any shellfish area in and around Barnstable County, let alone a regular seasonally closed area such as Falmouth's Great Pond.³³

Respondent argues that in the absence of law enforcement ordering him to stop digging shellfish because the shellfish area is CLOSED-TO-SHELLFISHING due to seasonal pollutants, he may continue to dig. In the absence of verbal notification from the shellfish constable who may or may not be observing respondent's digging activities at the time, respondent is suggesting that he may continue to harvest shellfish from an area that is CLOSED-TO-SHELLFISHING and then sell that shellfish. This argument is fallacious.³⁴

The Shellfish Constable is not the responsible party here simply because he did not inform respondent that he was digging in a shellfish area CLOSED-TO-SHELLFISHING at that time, but chose instead to continue his surveillance of respondent's activities. Discretion is an inherent part of law enforcement's police powers and frequently used to make continued observations of unlawful shellfish activity that may turn into a larger joint enterprise, conspiracy, unlawful interstate commerce, or sale to a non-permitted seafood dealer.³⁵ Law enforcement officials are under no obligation to stop an activity that may turn into a larger illegal enterprise after continued observation.³⁶

Respondent also argues that there was no visible signage in and around Great Pond that would have alerted him to the fact that Great Pond was classified at the time as CLOSED-TO-SHELLFISHING. There is no merit to this argument. There is nothing in 322 CMR 16.00 that requires as a condition to its enforcement that visible signage be placed in or around any shellfish area that is classified by the Director as CLOSED-TO-SHELLFISHING to the harvest of shellfish. The federal NSSP model sanitary shellfish regulations as implemented by DMF do not rely on or require the ineffective and decades old practice of informing harvesters of the status or classification of shellfish areas by the placement and maintenance of signage. Moreover, the 2018 emergency classification of Great Pond was required to close the area based on immediate seasonal changes in the water quality.³⁷

To safeguard threats to public health and as a condition to authorizing shellfish produced, harvested and sold for consumption to enter interstate commerce, states such as Massachusetts

³³ The record shows that portions of Great Pond have been seasonally classified CLOSED-PROHIBITED from May 1st to October 31st each year since 2015 due to seasonal pollutants. (Claimant's exhibit E).

³⁴ Respondent's summation at paragraph 13 of the "Affidavit" suggests that this would be the precise series of unfortunate events that would logically follow if law enforcement were not present at the right time and in the right location at the precise moment that digging takes place. The consequences of such a flawed view to the public health, welfare and safety would quite clearly turn this case on its head.

³⁵ G.L. c.130, §98 provides shellfish constables with the authority to enforce all shellfish laws including the powers of arrest for shellfish violations within the boundaries of the Town.

³⁶ Constable Martinson testified that after receiving the anonymous call about illegal digging in Great Pond, he positioned eight assistants at various locations including seafood dealers, intersections, and shellfish areas.

³⁷ Emergency classifications based on seasonal variants and other emergencies may be made in accordance with G.L. c.130, §74A. DMF is not required to make a "determination of contamination" in accordance with the numerous administrative requirements of G.L. c.130, §74, or to test the shellfish for contaminants as respondent suggests. Furthermore, the issues for adjudication in this case do not include alleged violations of G.L. c.130, §75. To be sure, many municipalities continue to provide signage to further alert harvesters to shellfish areas that are not open to the commercial harvest of shellfish.

must have the administrative ability to control commercial shellfish in a manner that conforms to the federal NSSP 's model ordinance. If a larger unlawful conspiracy to violate the sanitary shellfish regulations is taking place, law enforcement is wise to follow the continued activity to its end.

The Hendricks' Affidavit. Mr. Hendricks cross-examined claimant's witnesses, and both he and Mr. Tobey provided closing remarks, legal arguments and a summation. At the conclusion of Mr. Hendricks' closing statement, he asked for an opportunity to submit documents relating to the Tribal status and the aboriginal shellfish rights of the Mashpee Wampanoag. At the hearing, I took administrative notice of the United States' recognition of the Mashpee Wampanoag as a federally recognized Tribe, as well as the Commonwealth's recognition of the aboriginal shellfish rights of the Wampanoag Indians. Nonetheless, Mr. Hendricks was allowed ten days from the conclusion of the hearing to submit copies of official government documents, public records, and federal and state case law relating to the Mashpee Wampanoag and their aboriginal rights to shellfish for personal consumption or family sustenance.

Mr. Hendricks responded in a timely fashion by filing a three-page typed document entitled "AFFIDAVIT" containing seventeen individually numbered paragraphs of assertions made on behalf of respondent. However, respondent had exercised his right not to testify at the hearing. The affidavit, which is neither signed under oath, nor under the pains and penalties of perjury, seeks to add facts to the record after the hearing that I have not seen or heard and have not been subject to scrutiny by claimant's representative in the form of cross examination - an inherent part of administrative due process.³⁸ Paragraphs 1-9, and 17 are in essence legal arguments that were addressed in the Tentative Decision, and have been confirmed in this RFD. The remaining paragraphs 10-16 contain statements asserted on behalf of respondent referencing facts not in the record. Claimant's representative had no opportunity to ask questions of or otherwise cross-examine respondent regarding the assertions he purports to make in these particular paragraphs.³⁹

The remainder of the "AFFIDAVIT" contains two written legal arguments already made at the hearing. The first argument, that respondent was unaware of the fact that Great Pond was classified CLOSED-TO-SHELLFISHING, has no merit. Ignorance of marine fishery laws is not now and never has been a defense in adjudicatory proceedings involving a permit holders non-compliance with the applicable provisions of G.L. c.130 and 322 CMR. Additionally, there is no state or municipal legal requirement that either DMF or Falmouth install signage in and around Great Pond identifying its seasonal classification CLOSED-TO-SHELLFISHING. In his summation, Mr. Hendricks argued that had Constable Martinson told respondent that it was illegal to dig shellfish from Great Pond his client would have stopped digging immediately. Not only is that conjecture, but the fact remains that a violation had already taken place. That Constable Martinson continued his surveillance of respondent harvesting shellfish from Great

³⁸ G.L. c.30A, §11(3).

³⁹ Therefore, the statements asserted in paragraphs 10-16 are inadmissible in this hearing, I have redacted those paragraphs and they are not included in the administrative record of this proceeding. Mr. Hendricks' summation also argued substantive facts not in evidence at the hearing. These paragraphs are not reflected in the findings of fact in this RFD.

Pond and transporting that shellfish for sale to a seafood dealer does not change that fact. The surveillance disclosed additional illegal activity of not tagging the harvested shellfish before transportation, and falsifying tags, none of which are of the constable's doing.

Aaron Tobey, Jr., a Tribal member and past Tribal official testified on behalf of respondent. Mr. Tobey objected to the length of time that the Falmouth shellfish constable allowed respondent to dig shellfish in Great Pond without interrupting the activity and informing respondent that the area classification was CLOSED-TO-SHELLFISHING.

In addition, Mr. Tobey testified that the DMF website was not easy to navigate and he found that the sanitary shellfish page(s) on the classification of designated shellfish areas difficult and time consuming to navigate. I agree with Mr. Tobey's observation. The Commonwealth adopted a content-based system that made considerable changes in all agency websites and their navigation systems between 2017 and 2018. Massachusetts state government websites were undergoing content structure and navigation system changes. The Commonwealth made a complete switch from one system to an entirely different system.⁴⁰ There is a link to sanitary shellfish requirements on the first page of the DMF website, and the user may navigate to the NSSP sanitary regulations, shellfish area classifications, maps, technical information, agency contacts, and a helpline.

Voluntary compliance by shellfish harvesters with the requirements of 322 CMR 16.00 is essential to the overall protection of the public health, welfare, and safety, and the integrity of the Massachusetts shellfish industry as a whole. It would be injudicious, erode the ethical concept of voluntary compliance, and place undue burdens on law enforcement to suggest otherwise.

All respondent need do is review shellfish area classification information that is readily available to anyone prior to harvesting shellfish in any designated shellfish area. Under no circumstance is respondent permitted to rely on law enforcement to undertake his responsibility to be knowledgeable and aware of areas CLOSED-TO-SHELLFISHING, other than to provide him with all the information he needs to shellfish lawfully.

Respondent requests reconsideration of the recommendation contained in the Tentative Decision. His comments point out that the severity of the proposed recommendation of the Tentative Decision would, in his words, "prohibit him from ever having the ability to qualify for a commercial shellfish permit in the future".⁴¹ The recommendation as contained in the Tentative Decision provides that "the director not reinstate, renew, issue or reissue a commercial shellfish permit of any kind to respondent." It concludes that respondent "not be allowed to reapply for a commercial shellfish permit".

⁴⁰ On June 21, 2017 the Governor's Office announced that the Commonwealth's entire website system on *mass.gov* would be moving to Drupal-8, a content management system used by government's worldwide, that required MASSIT and executive agencies to rewrite all agency website content and its navigation structure (oddly the Drupal 8 content management system is itself an upgrade of the Drupal 7 system). See <https://www.mass.gov/news/baker-polito-administration-announces-redesign-of-massgov-seeks-public-feedback>.

⁴¹ Respondent's written comments to Tentative Decision, p.3

CONCLUSION AND RECOMMENDATION

The record establishes, and I find, that on August 8, 2018, respondent harvested, possessed, transported, and sold or attempted to sell shellfish harvested from Great Pond in Falmouth; an area classified by the Director as CLOSED-TO-SHELLFISHING and not in the OPEN category in violation of 322 CMR §16.04, and the conditions and restrictions attached by the Director to respondents commercial shellfish permit.⁴² Great Pond was not OPEN to the harvest of shellfish due to seasonal pollutants. I find that on the above date, respondent also failed to tag the shellfish he harvested before removing it from Great Pond. When asked by Lt. Bass where his completed tags were, respondent falsified dealer tags by listing an OPEN area, Waquoit Bay, as the location of his shellfish harvest in violation of 322 CMR §16.03(1).

I have reconsidered the recommendation contained in the Tentative Decision based in part on respondent's comments, the administrative record, and prior Final Decisions of the Director. Respondent has spent a short period of time as a permitted commercial shellfish harvester. Unfamiliarity with 322 CMR 16.00 and/or respondent's inability to fully understand and comprehend the duties and responsibilities of a commercially permitted shellfish harvester, and his failure to ask law enforcement personnel may have played a part in this case. The fact that the DMF classification of Great Pond, CLOSED-TO-SHELLFISHING, was seasonal from May 1st to October 1st also may have contributed to respondent's potential confusion. Finally, giving respondent the benefit of the doubt, if he had accessed the DMF website before he harvested shellfish, the Commonwealth's MASSIT change-over to a entirely different system may have rendered his efforts momentarily difficult. Finally, respondent shows no history of prior violations or conflicts with law enforcement in general or MEP specifically.⁴³

I am recommending, therefore, that the Director not reinstate, renew, issue, or reissue a commercial shellfish permit to respondent for a period of no less than one year from the date of the Director's Final Decision in this proceeding.

Dated: July 29, 2019

By: David C. Hoover

David C. Hoover, Esq.
Administrative Law Magistrate
Department of Fish and Game

⁴² The original version of 322 CMR 16.00 published by the Secretary of State on or about May 20, 2016 was in effect on August 8, 2018, the date of the violation, and on August 29, 2018, the date of the expedited hearing. On March 22, 2019, the Secretary published DMF's amended version of 322 CMR 16.00 which is presently in effect. (G.L. c.30A, §6. See attachments to this RFD).

⁴³ *Matter of Fountain*, Docket No.SSW-150031-JH (2016) (respondent prohibited from applying for a commercial shellfish permit where he conducted numerous commercial harvesting activities without a permit; was digging in an area of longstanding contamination; had a history of multiple shellfish violations; failed to report more than 200 commercial transactions of shellfish; and violated the provisions of G.L. c.130, §75. *Matter of Parsons*, Docket No.SSW-174809-DM (2018) (respondent with a seventeen year history of shellfish violations prohibited from applying for a commercial shellfish permit). *Matter of Whittemore*, Docket No. CSSP-146372-RT (2013) (experienced commercial shellfish permit holder repeatedly harvesting and concealing his shellfish taken from a local area closed to contamination for 24 consecutive years prohibited from applying for a commercial shellfish permit). See also *Matter of Fontancz*, Docket No.SSW-171771-DM (2016).

NOTICE

This is a Recommended Final Decision of the Administrative Law Magistrate. This Decision is therefore not a Final Decision of the Director and may not be appealed to the Superior Court pursuant to G.L. c. 30A. Because this is a Recommended Final Decision no party shall file a motion to argue, renew, or reargue this Decision or any portion of it and no party shall communicate with the Director regarding this decision, unless the Director, in his sole discretion, directs otherwise.

ATTACHMENTS

322 CMR: DIVISION OF MARINE FISHERIES

322 CMR 16.00: SHELLFISH HARVEST AND HANDLING

Section

- 16.01: Purpose and Scope
- 16.02: Definitions
- 16.03: Tagging of Shellfish
- 16.04: Possession of Shellfish from Areas Closed to Commercial Harvesting
- 16.05: *Vibrio* Management Plan for Harvest and Handling of Oysters
- 16.06: Authority to Suspend Permits for Violations of 322 CMR 16.00

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.

16.02: Definitions

For purposes of 322 CMR 16.00:

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*.

Director means the Director of the Division of Marine Fisheries.

Division means the Massachusetts Division of Marine Fisheries.

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

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.

Public Health means the Massachusetts Department of Public Health

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 (DSGA) 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.

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.

16.03: Tagging of Shellfish(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 5/8" by 5 1/4". 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.

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.

16.05: Vibrio Management Plan for Harvest and Handling of Oysters

(1) Purpose. The purpose of 322 CMR 16.05 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.

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

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

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*.

Broadcast Re-submergence means the return of loose, market-sized oysters to the waters of the original license site following off-site culling and/or oyster culture activities requiring re-submergence, as described at 322 CMR 16.05(4).

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*.

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 2 1/2 inches shell length for those 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) to an 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 aquaculturists that require the removal of oysters from the waters of the license site (grant) for the purposes of sorting, culling, grading, pitting, over-wintering and/or the removal of fouling organisms to enhance oyster marketability.

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.

Re-submergence means the return of market size oysters back to the water of the original license site (grant) after 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).

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.

16.05: continued

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.

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

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 16.05(3) and (4).

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), 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.

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), 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.

3. Methods for Icing. To meet these time to icing requirements, commercial fishermen and aquaculturists must place oysters and ice into a shellfish icing container using one of the following methods:

- Mesh bags containing oysters must 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;
- Loose oysters placed into a shellfish icing container must 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;
- Oysters held in an ice and water mixture (e.g., ice slurry or cold water dip) must be fully submerged and the ice and water mixture must be at or below 45°F to inhibit growth and proliferation of bacteria; or
- All ice and or water used to cool oysters must 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".

(b) Shading Requirement. All commercial fishermen and aquaculturists shall adequately shade oysters, as defined in 322 CMR 16.05(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.

(c) Shellfish Icing Tag Requirement. In addition to the tagging requirements at 322 CMR 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 16.03, 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:

- All oysters in the shellfish icing container are from a single harvester lot;
- 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

16.05: continued

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.

(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.

(4) Restrictions that Apply to Aquaculturists Only.

(a) Re-submergence Requirements for Off-site Culling Practices. Market-sized oysters may be removed from the original license site for the purpose of off-site culling, provided:

1. All removed oysters are returned to and segregated on the license site of at least ten days prior to being harvested for commercial purposes;
2. Off-site culling activities are subject to Aquaculture Propagation Permit permit conditions, issued by the Division pursuant to the authority at M.G.L. c. 130, § 80 and 322 CMR 7.01(7): *Conditions*; and
3. Prior to the removal of any shellstock from a license site, harvesters are required to notify the local municipal shellfish authority.

(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 that is not conducted on the license site is conducted within the same designated shellfish growing area as the license site;
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 license site, segregated and re-submerged for at least ten days prior to being harvested for commercial sale; and
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 and harvested not before the next calendar day.
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., 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 and shall not be harvested sooner than the following calendar day.

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

1. Logbook Requirements. Aquaculturists shall maintain a record in their Vp logbook of all market-sized oysters returned to the license 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, except that the date-out information shall not be completed prior to the end of the ten day re-submergence period.
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 for re-submergence. After such oysters have remained on the license 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.

16.05: continued

3. Alternatives to Container Tagging Requirements. Aquaculturists who engage in broadcast re-submergence or wish to mark multiple containers of re-submerged oysters using a single re-submergence tag 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:

- 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.

(d) Additional Re-submergence Restrictions.

- 1. Re-submergence of oysters may only be conducted by the permitted aquaculturists on the license 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), market-sized oysters returned to a license 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).

(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 determines that a commercial fisherman or aquaculturist is in possession of oysters that are out of compliance with the tagging, icing or other requirements set forth at 322 CMR 16.00, such oysters shall be destroyed.
- 2. In the event that oysters distributed into commerce are recalled in the case of illness, such oysters shall be destroyed.

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

- 1. In the event of a recall resulting from the closure of a harvest area due to illness, only those oysters received from harvesters and stored at a primary buyer's facility may be re-submerged.
- 2. In the event that the Division or Public Health determines that a primary buyer is in possession of oysters that do not comply with the tagging, icing or other requirements set forth at 322 CMR 16.00, such oysters may be returned to the aquaculturists, and re-submerged and segregated on the license site where they originated for ten days under the supervision of the local Shellfish Constable.
- 3. 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 for a minimum period of ten days;
 - 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); and
 - 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.

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

- (1) Subject to the procedures in 322 CMR 16.06(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.

16.06: continued

(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 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.

REGULATORY AUTHORITY

322 CMR 16.00: M.G.L. c. 130, §§ 17A, 52, 81, and 82.

322 CMR: DIVISION OF MARINE FISHERIES

322 CMR 16.00: SHELLFISH SANITATION, HARVEST, HANDLING AND MANAGEMENT

Section

- 16.01: Background and Purpose
- 16.02: General Definitions
- 16.03: Shellfish Growing Area Classification
- 16.04: The Sanitary Harvest, Handling and Transportation of Market Bound Shellfish
- 16.05: Tagging of Shellfish
- (16.06: Aquaculture (Reserved))
- 16.07: *Vibrio* Management Plan for Harvest and Handling of Oysters
- 16.08: Municipal Contaminated Shellfish Relay and Transplant
- 16.09: Possession of Shellfish from Areas Closed to Commercial Harvesting
- (16.10: Depurated Fishery Regulations (Reserved))
- 16.11: Authority to Suspend Permits for Violations of 322 CMR 16.00

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 biannual 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 nonconforming 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 322 CMR 16.00. 322 CMR 16.00 also serves to safeguard public health, maintains consumer confidence and promotes 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.

16.02: General Definitions

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

Approved Area means any shellfish growing area classified, pursuant to M.G.L. c. 130, § 74 or 74A, as Approved or Conditionally Approved, and not in a closed status pursuant to M.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 500.000: *Good Manufacturing Practices for Food* or retail food facilities permitted to sell ice pursuant to 105 CMR 590.000: *State Sanitary Code Chapter X - Minimum Sanitation Standards for Food Establishments*.

16.02: continued

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 M.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 M.G.L. c. 130, §§ 2, 75 and 80, and 322 CMR 7.01(2): *Commercial Fisherman Permits*. 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 M.G.L. c. 130, § 74 or 74A, as Prohibited, Restricted, Conditionally Restricted, Conditionally Approved or Approved and in a closed status.

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

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.

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.

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

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.

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

Discard means to return live shellfish to the sea.

16.02: continued

Division means the Massachusetts Division of Marine Fisheries.

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

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, or otherwise stowed.

Growing Area means any site which supports or could support the propagation of shellfish 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 at www.mass.gov/marinefisheries.

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

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

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.

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: *Regulation of Catches*, and may be harvested and sold for commercial purposes.

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.

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

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.

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

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

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

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

16.02: continued

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

Prohibited Shellfish Growing Area means a growing area classified pursuant to M.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: *Quahogs, Soft Shelled Clams and Oysters*.

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 M.G.L. c. 130, § 57, which results in the commercial production of shellfish.

Shellfish Aquaculturist means any person permitted by the Division pursuant to M.G.L. c. 130, §§ 2, 17B and 80, and 322 CMR 7.01(4)(c): *Special Project* and 322 CMR 15.04: *Permits* to plant and raise shellfish at a specific location, licensed in accordance with M.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.

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 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.

16.02: continued

Vessel means any commercial fishing vessel, boat, ship or other water craft registered under the laws of the Commonwealth, as defined at M.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 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. When engaged in the wet storage of shellfish at its Newburyport Shellfish Depuration Plant, the Division does not act as a dealer for the purpose of Wet Storage and therefore does not require a separate permit or other authorization for such activity.

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:

- (a) an evaluation of pollution sources that may affect an area;
- (b) an evaluation of the hydrographic and meteorological characterizes that may affect the distribution of pollutants; and
- (c) 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 M.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 M.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.

16.03: continued

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

(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 M.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 M.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 M.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 M.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: *Management of Moderately Contaminated Shellfish*.
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): *Special Project*.

(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:

16.03: continued

- (a) Announce changes to existing shellfish growing area classifications in accordance with the public notification procedures set forth at M.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 at www.mass.gov/marinefisheries.
 - (c) Make available to the public maps depicting all shellfish growing areas and their classification on the Division's website at www.mass.gov/marinefisheries.
- (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 M.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.

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

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- (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 during the harvest and transport of shellstock.
 - (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 fitting lid. The sanitation device shall be indelibly marked in a contrasting color "HUMAN WASTE" in letters that are at least three inches in height.
 - (c) No dogs, cats and other pets shall be onboard the vessel while harvesting or transporting market bound shellstock.
 - (d) 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.
- (4) Washing of Market Bound Shellfish and Shellstock.
- (a) All market bound shellfish and shellstock shall be washed reasonably free of bottom sediments as soon after harvesting as practicable and 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 M.G.L. c. 130, § 80, and 322 CMR 7.01(2): *Commercial Fisherman Permits* and 322 CMR 7.07: *Dealers Acting as Primary Buyers* or prior to the sale to such dealer, whichever action occurs first.
 - (b) All market bound shellfish and shellstock shall be washed 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.

16.04: continued

(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; or
3. a growing area with a classification and status other than the growing area where harvested.

(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., a commercial fishermen may ice shellstock 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 the drinking water quality standards in the Massachusetts Department of Environmental Protection's regulations at 310 CMR 22.00: *Drinking Water*.

a. Municipal Drinking Water Sources. Compliance with drinking water quality standards at 310 CMR 22.00: *Drinking Water* 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: *Drinking Water* 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 M.G.L. c. 130, § 80, and 322 CMR 7.01(2): *Commercial Fisherman Permits* and 322 CMR 7.07: *Dealers Acting as Primary Buyers*.

(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 1st through October 31st, 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.

16.04: continued

(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: *Management of Moderately Contaminated Shellfish*.

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 2⁵/₈ inches in height by 5¹/₄ inches 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;
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: *Management of Moderately Contaminated Shellfish*.

(4) When harvest occurs in an inter-tidal area and time of harvest is accurately recorded as the time when the first piece of shellfish in a lot is exposed during a single low tide cycle, then the time of harvest recorded on the shellfish tag shall not be deemed a violation of the prohibition on nighttime fishing at M.G.L. c. 130, § 68.

(16.06: Aquaculture (Reserved))

16.07: *Vibrio* Management Plan for Harvest and Handling of Oysters

(1) Purpose. The purpose of 322 CMR 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. 322 CMR 16.07 applies to commercial fishermen and dealers possessing shellstock oysters.

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

Adequately Iced means the amount and 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).

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

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

Market Bound Oysters means all oysters removed from a designated shellfish growing area by a commercial fisherman 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 shellfish aquaculture grant site to 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 involve the removal of oysters from the waters of the 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.

Re-submergence means the return of market size oysters back to the water of the licensed shellfish aquaculture grant site from which they were harvested after being previously 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 16.07(4).

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 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 16.07(3).

Vp Logbook means the Division issued logbook required to be used by all commercial fishermen during the *Vp* season to record required icing and re-submergence information described at 322 CMR 16.07(3) and (4).

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

16.07: continued

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

(a) Icing Requirements.

1. General Time to Icing. All commercial fishermen shall adequately ice oysters, as defined in 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.
2. Seasonal Time to Icing Requirements for Certain Growing Areas. From July 1st through September 15th, all commercial fishermen 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 16.07(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.
3. Methods for Icing. To meet the time to icing requirements specified at 322 CMR 16.07(3)(a), commercial fishermen shall place oysters and ice into a shellfish icing container using one of the following methods:
 - a. Mesh bags containing oysters 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 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) 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 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".

(b) Shading Requirement. All commercial fishermen shall adequately shade oysters, as defined in 322 CMR 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.

(c) Shellfish Icing Tag Requirement. In addition to the tagging requirements at 322 CMR 16.05, commercial fishermen 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 from attaching harvester tags, as specified at 322 CMR 16.05, 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:

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 must have in their possession the Division 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.

(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 are prohibited from handling and/or holding market bound oysters at any unlicensed facility prior to receipt by the primary buyer.

16.07: continued

(4) Restrictions that Apply to Shellfish Aquaculturists Only.

(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 for the purpose of off-site culling, provided:

1. All removed oysters are returned to and segregated on the licensed shellfish aquaculture grant site of at least ten days prior to being harvested for commercial purposes;
2. Off-site culling activities are conducted in accordance with conditions to the Aquaculture Propagation Permit, 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
3. Shellfish aquaculturists shall notify the local municipal shellfish authority prior to the removal of any shellstock from a licensed shellfish aquaculture grant site.

(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 activities that are not conducted on the licensed shellfish aquaculture grant site shall take place within same designated shellfish growing area as the licensed shellfish aquaculture grant site;
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
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 licensed shellfish aquaculture grant site, but shall not be harvested until at least the following calendar day.
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 16.07(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 licensed shellfish aquaculture grant site and shall not be harvested until the following calendar day.

(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 licensed shellfish aquaculture grant site after off-site culling or oyster processing activities requiring re-submergence. The *Vp* logbook shall be filled out at the time of re-submergence when the last market-sized oyster is returned to the 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.
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 licensed shellfish aquaculture grant site for re-submergence. After such oysters have remained on the 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 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:
 - a. A description of the re-submergence method (*e.g.*, broadcast, holding cars, cages, *etc.*);
 - b. A description of the segregation method to be utilized, including a site map marking the segregated re-submergence area; and
 - c. A description of the re-submergence tagging method to be utilized.
 - d. All such re-submergence activities shall be conducted in accordance with the re-submergence plan approved by the Division.

16.07: continued

(d) Additional Re-submergence Restrictions.

1. Re-submergence of oysters may only be conducted by the permitted aquaculturists on the same 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 16.07(4)(b), market-sized oysters returned to a 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 16.07(4).

(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 Massachusetts Environmental Police determines that a commercial fisherman is in possession of oysters that are in violation of 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.
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.

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

1. In the event of a recall resulting from the closure of a growing area due to illness, only those oysters received from harvesters and stored at a primary buyer's facility may be re-submerged.
2. In the event that the Division or the Department of Public Health determines that a primary buyer is in possession of oysters 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 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:
 - a. Recalled oysters have been segregated and re-submerged on the licensed shellfish aquaculture grant site for a minimum period of ten days;
 - b. 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;
 - c. 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 16.07(4); and
 - d. 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.

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 St. 2017, c. 47, § 112, 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.

16.08: continued

(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 M.G.L. c. 130, § 98, or a Massachusetts Environmental Police Officer or other enforcement officer authorized to enforce M.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)(c): *Special Project*. A copy of this 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 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.

(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.

16.08: continued

(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 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.
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): *Conditions*, 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 date of harvest;
4. Shellfish growing area where the contaminated shellfish were harvested from;
5. The municipality where the transplant site is located; and
6. 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 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.

16.09: Possession of Shellfish from Areas Closed to Commercial Harvesting

(1) Purpose. Shellfish management in Massachusetts is a cooperative effort between state and municipal government. The purpose of 322 CMR 16.09 is to ensure 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 the Division or the municipality that regulates commercial harvest in its waters pursuant to M.G.L. c. 130, § 52.

(2) Prohibitions. It shall be unlawful for:

(a) Commercial fisherman to harvest, attempt to harvest, sell, or attempt to sell any shellfish from any growing area, or part thereof, that is not open to commercial harvest by the Division or the municipality that regulates commercial harvest in its waters pursuant to M.G.L. c. 130, § 52.

(b) A dealer to accept or attempt to accept from any person shellfish that was taken from a shellfish growing area, or part thereof, that is not open to commercial harvest by the Division or the municipality that regulates commercial harvest in its waters pursuant to M.G.L. c. 130, § 52.

(16.10: Depurated Fishery Regulations (Reserved))

16.11: Authority to Suspend Permits for Violations of 322 CMR 16.00

(1) Subject to the procedures in 322 CMR 16.11(2)(b), the Director may suspend without a prior hearing the permit of a commercial fisherman, 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 16.10 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 the 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.

REGULATORY AUTHORITY

322 CMR 16.00: M.G.L. c. 130, §§ 17A, 52, 81 and 82.

Adjudicatory Proceeding DOCKET		Docket No: SSW-175920-DM-18		Department of Fish and Game Division of Marine Fisheries			
Hearing Caption: In the Matter of Carlton Hendricks, III and Shellfish and Seaworm Permit #175920 and Shellfish Transaction Card				Division of Marine Fisheries 251 Causeway Street Hearing Room Suite 400 Boston, MA 02114 (617) 626-1520			
Date Filed: August 13, 2018		Date Disposed: August 19, 2019					
Petitioner: Daniel J. McKiernan, Deputy Director MA Division of Marine Fisheries 251 Causeway Street, Suite 400 Boston, MA 02114				Petitioners Attorney:			
Respondent: Carlton Hendricks, III 165 Ningret Avenue Mashpee, MA 02645				Respondents Attorney:			
NO.	Entry Date	Docket Entries					
1	August 13, 2018	Immediate Suspension of Commercial Shellfish Permit					
2	August 13, 2018	Show Cause Order and Respondent's Right to Request an Expedited Hearing Date					
3	August 16, 2018	Notification of UPS Delivery					
4	August 20, 2018	Updated Town of Falmouth Incident Report					
5	August 20, 2018	2018 Commercial Permit Application; Shellfish Transport, Harvest and Handling Affidavit; and 2018 Shellfish Permit Conditions					
Page 1 of 2	A TRUE COPY ATTEST	Adjudicatory Proceedings Clerk: X Jared A. Silva (signed electronically)				Date: 8/21/19	

Adjudicatory Proceeding DOCKET		Docket No: SSW- 175920-DM-18	Department of Fish and Game Division of Marine Fisheries 
NO.	Entry Date	Docket Entries	
6	August 21, 2018	UPS Notification of Delivery	
7	September 6, 2018	Affidavit of Carlton Hendricks, Jr.	
8	January 10, 2019	Tentative Decision	
9	January 14, 2019	UPS Notification of Delivery	
10	February 8, 2019	Respondent's Motion for Extension to File Written Comment to Magistrate's Tentative Decision	
11	February 12, 2019	Allowed Motion for Extension to File Written Comment to Magistrate's Tentative Decision	
12	March 11, 2019	Respondent's Objection to Tentative Decision and Memorandum on Aboriginal Rights	
13	July 29, 2019	Recommended Final Decision	
14	August 19, 2019	Director's Final Decision	
15	August 20, 2019	UPS Notification of Delivery	
Page 2 of 2	A TRUE COPY ATTEST	Adjudicatory Proceedings Clerk: X Jared A. Silva (signed electronically)	Date: 8/21/19