



**MARINE FISHERIES ADVISORY COMMISSION  
BUSINESS MEETING AGENDA**

**9:00 AM**

**May 21, 2020**

**Held Virtually Via Zoom**

**Webinar Link:**

<https://us02web.zoom.us/j/89716876037?pwd=UFIRRTArV1J0SEVpZDZ4Uks5ZTB2Zz09>

**Dial In: 1-312-626-6799**

**Webinar ID: 897-1687-6037**

**Webinar Passcode: 396165**

1. Introductions and Announcements (9:00 – 9:15)
  - a. Review and Approval of the May 21, 2020 Business Meeting Agenda
  - b. Review and Approval of the April 1, 2020 Draft Business Meeting Minutes
2. Action Items (9:15 – 9:45)
  - a. Annual MFAC Officer Elections
  - b. Commissioner's Recommendation on DMF Director
3. Comments (9:45 – 10:30)
  - a. Chairman
  - b. Commissioner
  - c. Director
  - d. Law Enforcement
4. Optional Break (10:30 – 10:40)
5. Discussion Items (10:40 – 12:00)
  - a. Review of Recent ASMFC and Council Meetings
  - b. May Groundfish Closure in Gulf of Maine: Industry Requests and DMF Response
  - c. Ongoing Review of Local Shellfish Aquaculture Regulation
  - d. Impacts of COVID-19 on Seafood and Fishing Industry
    - i. Mass CARES Act Fisheries Relief
    - ii. DMF Seafood Marketing Promotion
    - iii. Seafood Procurement by State Agencies
    - iv. Increase in Retail Boat Permits and Challenges
    - v. Updates from Commission Members
6. Optional Break (12:00 – 12:10)
7. Presentation on the Preliminary Findings of DMF's Squid Report (12:10 – 12:45)
8. Other Business (12:45-1:00)
  - a. MFAC Meeting Schedule for Remainder of 2020
  - b. Commission Member Comments
9. Adjourn (1:00)

**Future Meeting Dates**

**9AM**

**June 18, 2020**

**TBD**

All times provided are approximate and the meeting agenda is subject to change. The MFAC may amend the agenda at the start of the business meeting. Due to constraints imposed by virtually meeting capabilities, public comment will not be accommodated during the May 14, 2020 MFAC business meeting. However, the public may log into the meeting virtually and follow the proceedings.

## **MARINE FISHERIES ADVISORY COMMISSION**

**April 1, 2020**

**Held Virtually via Zoom**

### **In attendance:**

*Marine Fisheries Advisory Commission:* Raymond Kane, Chairman; Michael Pierdinock, Vice-Chairman; William Doyle, Clerk; Arthur "Sooky" Sawyer; Kalil Boghdan; Charlie Quinn; Tim Brady and Lou Williams.

*Division of Marine Fisheries:* Daniel McKiernan, Acting Director; Michael Armstrong, Assistant Director; Kevin Creighton, CFO; Jared Silva; Nichola Meserve; Story Reed; and Melanie Griffin.

*Department of Fish and Game:* Ron Amidon, Commissioner; Mary Lee King, Deputy Commissioner; Mark Reil, Director of Legislative Affairs.

*Massachusetts Environmental Police:* Colonel Sean Santos; Major Pat Moran and Lt. Matt Bass.

## **INTRODUCTIONS AND ANNOUNCEMENTS**

Jared Silva stated that Governor Baker issued a March 12, 2020 Executive Order suspending certain aspects of the Open Meeting Law in response to the ongoing public health crisis related to the COVID-19 pandemic. This order allowed the MFAC to meet virtually via Zoom.

Chairman Ray Kane called the April 1, 2020 Marine Fisheries Advisory Commission (MFAC) business meeting to order.

## **REVIEW AND APPROVAL OF APRIL 1, 2020 BUSINESS MEETING AGENDA**

No changes to the April 1, 2020 MFAC business meeting agenda were proposed.

**Tim Brady made a motion to approve the draft agenda. The motion was seconded by Charlie Quinn. The motion was approved unanimously.**

## **REVIEW AND APPROVAL OF FEBRUARY 20, 2020 DRAFT BUSINESS MEETING MINUTES**

Chairman Kane asked if there were any amendments to the February 20, 2020 MFAC draft business meeting minutes. No amendments were offered.

**Sooky Sawyer made a motion to approve draft minutes as provided. Charlie Quinn seconded the motion. The motion was approved unanimously.**

## **PUBLIC COMMENTS**

Public comments were not possible in the “virtual” meeting format as allowed under Governor Baker’s Executive Order on the Open Meeting Law to accommodate the Stay-At-Home advisory.

#### **CHAIRMAN’S COMMENTS**

The Chairman did not provide any comments.

#### **COMMISSIONER’S COMMENTS**

Commissioner Ron Amidon thanked DMF staff for their work in facilitating this virtual meeting. He also expressed his support for the agency and their work with the seafood industry during the pandemic.

Ron stated that Jack Sheppard had recently passed away. Jack was the former Director of the Office of Fishing and Boating Access and he had just recently retired from this position.

Sooky Sawyer asked about the status of the DMF Director’s appointment. Ron stated that Dan was scheduled to meet with Governor Baker in mid-March, but the meeting was cancelled due to the pandemic. He was optimistic that the administration would allow him to move the appointment forward in the near future.

Bill Doyle asked if the process for nominating the Director could be amended. Bill was interested in having the MFAC vote on Ron’s recommendation and then having this vote forwarded to the administration. Ron did not think that would be possible.

#### **DIRECTOR’S COMMENTS**

Acting Director Dan McKiernan thanked DFG’s technical staff and Jared Silva for facilitating this virtual meeting. Dan then began his comments by focusing on the pandemic.

Much of DMF’s work continued with staff working remotely. Project leaders were trying to determine how to conduct field work and shellfish sampling while adhering to social distancing protocols. NOAA Fisheries cancelled its trawl surveys, and DMF’s spring inshore trawl survey would be cancelled because it was conducted on a NOAA contracted vessel. Additionally, the MRIP survey program was being curtailed and DMF was suspending the hiring of field technicians for the 2020 season.

The seafood industry was reeling due to reduced international trade and the loss of domestic restaurant markets. To promote demand there was an increased focus on enhancing the retail sale of seafood through “buy local” campaigns. To accommodate this, DMF made its retail boat permit available for free. This permit allows commercial fishermen to sell live crabs and lobsters and whole finfish fish directly to the public from the back of their boat. While the sale of shellfish is typically restricted under the

authority of the retail boat permit, DMF and DPH agreed to a pilot program to allow the direct sale of shucked sea scallop adductor meat. There were also industry driven efforts for the curbside sale of seafood. For instance, the Gloucester Fisherman's Wharf held a seafood pop-up event where fresh haddock fillets and day boat scallops were made available to the public through a drive-up operation. This event serviced over 500 customers and received favorable press.

DMF was also working with fishermen, seafood dealers, industry organizations, and the Baker administration to ensure the seafood industry had access to federal PPP funding.

While little fishing activity was occurring due to the pandemic, DMF did take action to extend the local commercial bay scallop fisheries in Eastham and Orleans. State law establishes an open fishing season of October 1 – March 30, but provides DMF with the authority to extend the season upon request of the local municipal government. Dan anticipated Wellfleet may also seek an extension.

Dan then asked Melanie Griffin to provide an overview of the upcoming New England Fishery Management Council (NEFMC) meeting. Melanie stated that the meeting would be held virtually, and the agenda was paired down due to the pandemic. With regards to groundfish, she expected: (1) final action on Amendment 23 (commercial monitoring) would be postponed; (2) MRAG Americas would present its analysis of sector management; and (3) observer requirements would be waived during the pandemic. On scallops, Melanie anticipated Amendment 21 would be approved. This Amendment addressed Limited Access General Category possession limits and Northern Gulf of Maine management requirements. Lastly, there would be some discussion regarding rebuilding whiting and southern red hake.

Mike Pierdinock noted that the market for frozen fish remained stable, but it was soft for fresh fish. He was curious about what efforts were being made to get fresh fish to consumers. Dan stated this was a result of losing the restaurant market. He did not think it would be possible to restore fresh fish markets while restaurants remained closed. However, efforts were being made to increase local demand for fresh seafood and enhance frozen fish inventories.

Mike P. then noted the for-hire industry was experiencing cancellations throughout the spring season in response to the pandemic. He was curious if any considerations were being given to extending recreational fishing seasons into the fall to recoup lost fishing opportunities this spring. Dan stated he was on a national state director's call and this topic was discussed. One of the major challenges is that without the MRIP program functioning this spring it will be difficult to demonstrate loss of participation and catch, particularly as the private angler mode may be rather active in response to the pandemic.

Tim Brady asked if any consideration was being given to considering party boats as essential businesses due to their function of providing food. Ron and Dan were

skeptical that this could occur given state and federal protocols on social distancing and gatherings of 10 or more people.

Mike P. asked if there were any discussions to restrict recreational shellfish harvesting. He noted this was an activity that would provide a healthy food source and could be conducted with social distancing. Dan was unaware of any discussions to restrict this activity.

### **LAW ENFORCEMENT COMMENTS**

Lt. Matt Bass stated that fishing activity was slow. He expected elver poaching would be limited due to lower demand and market loss. However, he was worried about the upcoming recreational fishing season and the ability to maintain social distancing while at boat ramps and fishing from shore.

Bill Doyle asked if there any discussions regarding closing boat ramps. Matt stated he had not received any information that indicated ramps would close, but he speculated that access sites may be forced to implement social distancing protocols. Ron stated that the OFBA ramps remain open, but they have been instructed to suspend permits for fishing tournaments.

### **ACTION ITEMS**

DMF provided the MFAC with a series of memorandums that provide proposed recommendations to amend fishing limits for 2020. Each memorandum sets forth the rationale and background for each action, as well as a summary of public comment. Additionally, DMF forwarded the MFAC ample written public comments received. Dan noted that DMF had recently started using a new outreach tool (Granicus), and this was producing more interaction with the agency on proposed rule changes.

Chairman Kane stated that it was his preference to vote on all motions by unanimous consent and then proceed only to a roll call vote if there were objections to the adopted motion. There were no objections to this approach.

#### Recreational Bluefish Limits

Dan recommended the MFAC vote to reduce the recreational bluefish limit from 10-fish to 3-fish with an allowance for patrons onboard a for-hire vessel to retain 5-fish. This 5-fish limit would not apply to the captain and crew; they would be subject to the 3-fish limit.

This recommendation was being made in response to a recent joint action by the Atlantic States Marine Fisheries Commission (ASMFC) and Mid-Atlantic Fishery Management Council (MAFMC) to reduce the recreational harvest of bluefish within the 2020 recreational harvest limit. These limits were being adopted on a coastwide basis.

Dan noted that he was concerned about having disparate rules across recreational fishing modes and added that rank and file recreational fishermen have consistently objected to providing the for-hire mode with more access to the resource. He thought the use of “mode splits” as a management tool deserved more scrutiny and wanted ASMFC to better address if and when it should be used. However, as these rules were being implemented on a coastwide basis, he did not want to put Massachusetts for-hire operations at a competitive disadvantage and was not proposing to eliminate the 5-fish for-hire allowance.

The Chairman called for a motion. **Sooky Sawyer made a motion to adopt DMF’s recommendation to establish a 3-fish recreational bag limit for bluefish with a 5-fish allowance for patrons fishing onboard for-hire vessels during a for-hire trip. The motion was seconded by Tim Brady.**

Mike Pierdinock appreciated the split mode approach for bluefish. He noted that bluefish are often used as bait during for-hire trips for sharks and bluefin tuna and this allowance would continue to accommodate that practice. However, he wanted to see DMF have the 5-fish bag limit apply to for-hire captains and crew. He noted that an unintended consequence may be that more bluefish are taken under the authority of a commercial permit for personal bait use and that the catch would go unreported.

Dan asked Nichola Meserve if Mike’s recommendation would be consistent with the coastwide approach. Nichola confirmed that it would. Accordingly, Dan expressed a willingness to modify his recommendation to adopt a 3-fish recreational bag limit for bluefish with a 5-fish allowance for all anglers fishing onboard a for-hire vessel during a for-hire trip.

The Chairman called for a substitute motion. **Tim Brady made a motion to adopt DMF’s revised recommendation. The motion was seconded by Bill Doyle. No further comments were made. The motion as approved by unanimous consent (7-0)**

#### Recreational Striped Bass Limits

Dan McKiernan reviewed DMF’s proposed recommendation on recreational striped bass limits to: (1) adopt a slot limit of 28” to less than 35”, replacing the 28” minimum size limit; (2) amend the state’s existing circle hook mandate to remove the exemption for weighted treble hooks; (3) allow the targeting of other species with natural bait on a non-circle hook when a striped bass is already in possession; and (4) prohibit the removal of striped bass from the water by any device that may pierce or puncture the fish.

As an aside, Dan stated that the slot limit was being adopted throughout the northeast, which was important for enforcement and compliance. The joint MFAC/DMF letter to RI DEM influenced their final decision to adopt the slot limit and not move forward conservation equivalent measures and proposed “mode splits”.

Lt. Bass noted that the recommended circle hook language was different than what was proposed at public hearing. The public hearing language would have required the use of circle hooks when fishing for striped bass or in possession of striped bass; the recommended language would only apply when fishing for striped bass. Matt expressed concern that the recommended language would limit the enforceability of the rule.

Dan explained that the rationale for the change was to not limit the ability for recreational anglers to target other species with non-circle hooks (e.g., black sea bass) once they had retained a striped bass.

Mike Armstrong recognized that this rule would likely be difficult to enforce and opined that the rule was not written to maximize compliance but to educate anglers and facilitate getting this gear into bait shops and tackle boxes. He was comfortable with this tradeoff if it ended up with anglers increasing their use of circle hooks.

Mike then noted that the rule may be subject to change again in 2021, as it will be required coastwide by the ASMFC. States are required to submit their circle hook rules by August for review during the fall of 2020, and the Striped Bass Board may end up requiring states to eliminate certain exemptions or have their rules apply more strictly.

Chairman Kane asked DMF if they intended to amend their recommendation based on comments from the Massachusetts Environmental Police. Dan indicated that he did not intend to amend his recommendation. He agreed with Armstrong's assessment and felt it was important to get the rule on the books, work to educate the tackle shops and the public and then tweak the rule towards compliance over time.

Mike Pierdinock asked if the rule applied to artificial lures. Jared Silva stated that it did not.

No further comments were made. The Chairman called for a motion. **Mike Pierdinock made a motion to adopt DMF's recommendation as provided. The motion was seconded by Bill Doyle. The motion was approved by unanimous consent (7-0).**

#### Commercial Striped Bass Management

The proposed recommendation on commercial striped bass management was to: (1) increase the commercial minimum size from 34" to 35" total length; (2) rescind the fin-clipping rule for commercial fishermen fishing recreationally on closed commercial days; (3) rescind the allowance for for-hire operators to sell unwanted striped bass taken recreationally by their clients on a charter on open commercial days; and (4) adjust the open commercial fishing days from Mondays and Thursdays to Mondays and Wednesdays.

Dan stated that the minimum size increase was designed to segregate the recreational and commercial fishing sectors based on the size of fish they may retain. This should improve enforcement and compliance and prevent stockpiling on closed commercial fishing days. If the minimum size were to be increased and the fisheries segregated

based on size limits, it would also eliminate the need for the fin clipping rule and the allowance to sell certain striped bass taken on a for-hire trip on a commercial fishing day. Lastly, moving the open fishing days from Mondays and Thursdays to Mondays and Wednesdays was done for market reasons and was supported by dealers. It would also allow commercial fishermen to not have commercial black sea bass and striped bass fishing days overlap, providing increased access to both rod and reel fisheries.

Mike P. and Dan discussed the potential to amend these regulations moving forward if the management plan is adjusted or fishery performance changes.

No further comments were made. The Chairman called for a motion. **Bill Doyle made a motion to adopt DMF's recommendation as provided. The motion was seconded by Kalil Boghdan. The motion was approved by unanimous consent (7-0).**

#### Commercial Menhaden Management

Dan recommended the MFAC approve: (1) rescinding the limited access fishery's 95% quota trigger, resulting in a 25,000-lb trip limit from 85%–100% of quota use; (2) replacing the 1,000-lb bycatch tolerance allowed after the quota is taken with a 6,000-lb incidental catch and small-scale fishery allowance; and (3) adopting new regulations to allow Massachusetts to potentially opt into the interstate FMP's episodic event quota set-aside (EESA) afforded to states from Maine to New York.

Dan provided some brief background on how the state manages its commercial quota. The limited entry fishery starts with a 125,000 pound trip limit, which is reduced to 25,000 pounds when 85% of the quota is taken, and 6,000 pounds when 95% of the quota is taken. If 100% of the quota is taken, there is a 1,000 pound incidental catch limit subject to certain gear restrictions on purse seine size.

These current rules are more restrictive than what is allowed under the FMP. For instance, the current rules do not allow for participation in the EESA. Under the FMP, 1% of the overall coastwide quota is set-aside to northeast states (ME-NY) for use if they take their allocated commercial quota by September 1. Moreover, DMF's 1,000 pound incidental catch limit is more restrictive than the 6,000 pound small scale fishery limited allowed under the FMP.

DMF's recommendation is designed to better utilize the available quota and bring the state's regulations into line with what is allowed under the FMP. In recent years, the state's 95% trip limit trigger has prevented Massachusetts from taking 100% of its available quota. By eliminating this trip limit trigger and allowing the fishery to remain open at the 25,000 pound limit it is likely that the limited entry fishery will be able to take its available quota.

Also, if the quota is taken before September 1, the recommended rule change would allow MA to potentially participate in the EESA program. If MA does not opt into the EESA program or the EESA quota is exhausted before MA's fishery closes, DMF may seek quota transfers from other states with unutilized quota. This approach was taken in

2019 to keep the fishery open at the 25,000 pound trip limit. The 6,000 pound small scale fishery limit would replace the 1,000 pound incidental catch limit and would apply once the quota is taken and the EESA and quota transfer options are exhausted. Dan opined that this would constrain directed purse seining effort, but may allow some continued commercial harvest by cast netters and surface gillnetters.

Chairman Kane and Nichola Meserve further discussed the EESA. They noted that ME, RI and NY had participated in this fishery in recent years and that this fishery is accounted for in the commercial quota. The maximum trip limit for this fishery is 120,000 pounds, so it would accommodate large scale purse seine operations.

The discussion then moved onto the 6,000 pound small scale fishery allowance. Nichola noted that in past years the catch under this allowance was estimated to be less than 1% of the coastwide quota. Despite this, Dan thought the ASMFC needed to more closely review this provision.

Mike P. stated that he did not support increasing access to forage fish, particularly if it could impact local abundance. Dan stated that given ME's small quota, they would likely take most of the EESA before MA could apply to access it. Moreover, DMF can always take a cautious approach to pursuing additional quota. This change only provides DMF with the ability to participate in the EESA program if quota remains available.

Lou Williams and Sooky Sawyer expressed their support for DMF's recommendation. Mike P. asked Lou and Sooky if the EESA and small scale fishery programs would supply local bait markets. Lou and Sooky thought it had the potential to meet some of the local demand. Dan noted that DMF does not track where bait landed in MA is sold nor where bait sold in MA was landed.

No further comments were made. The Chairman called for a motion. **Sooky Sawyer made a motion to adopt DMF's recommendation as provided. The motion was seconded by Lou Williams. The motion was approved by unanimous consent (7-0).**

Dan then added that DMF was moving forward with the requirement that the limited entry menhaden permit endorsement be an owner-operator permit. He thought this would help control that activation of latent effort and enhance accountability among active fishermen. He opined that high levels of accountability is important in this fishery given the potential conflict between inshore seiners and other stakeholders.

As a point of order, Jared Silva explained that this final action affects permitting, and does not necessitate a vote by the MFAC. However, DMF was seeking the MFAC's input.

Mike P. asked if this would impact any of the existing inshore seining operations. Dan stated that it would not, as all active fishermen currently run owner-operator operations.

### Commercial Black Sea Bass Management

Dan provided the MFAC with his recommendation to: (1) increase the weir set-aside from 15,000 pounds to 24,000 pounds; (2) increase the directed fishery trip limits for potters from 300 pounds to 400 pounds and maintain the existing Sunday/Tuesday/Thursday open fishing day schedule; (3) increase the directed fishery trip limit for anglers from 150 pounds to 200 pounds and maintain the existing Sunday/Tuesday/Thursday open fishing day schedule; (4) increase the trawl bycatch limits during the springtime (April 23 – June 9) small mesh trawl squid fishery from 50 pounds to 100 pounds and maintain the existing 50,000 pound seasonal landings cap; and (5) decrease the summertime large mesh trawl bycatch allowance of black sea bass from 150 pounds to 100 pounds but allow vessels to retain and land black sea bass during open summer flounder fishing days within the directed summer flounder season (i.e., Sundays – Thursdays beginning on June 10) rather than only on open black sea bass fishing days during the directed black sea bass fishery (i.e., Sunday/Tuesday/Thursday beginning on July 8).

These changes were being proposed in response to a 59% increase to the commercial quota for 2020. If implemented, DMF expected the fishery would have better access to the available quota and the regulatory discarding of dead saleable fish by the trawl fleet would be reduced. Moreover, this recommendation was consistent with those proposals developed by the ad-hoc industry committee in December 2019.

Dan noted that the pandemic impacted seafood markets and made it difficult to forecast future market conditions. Accordingly, he did not want to manage this fishery based on speculation of what markets will be like this summer. Looking at last year's performance, and this year's quota increase, he felt these changes were justifiable. If market conditions are such that in-season regulatory adjustments are needed, then DMF can propose such actions at a future meeting (e.g., August).

Sooky Sawyer asked if Gloucester weir fishermen would be able to land any black sea bass caught in their gear. Jared Silva and Story Reed indicated that the weir fishery was not managed on a geographic basis, and the ability to retain black sea bass was dependent on whether or not quota remained available and if the operators held a black sea bass permit endorsement.

Mike P. stated that commercial anglers were frustrated by not being provided with a springtime bycatch allowance, particularly as trawlers are provided with such an allowance. Dan noted that the trawler allowance was designed to prevent the discarding of dead black sea bass that may be caught in their nets. While most trips only land 25 pounds, some observer data shows a small number of trips may catch between 50 and 100 pounds of saleable fish. Given gear restrictions and spatial closures, he did not think this would contribute to directed trawl fishing effort. With regards to a bycatch allowance, the rod and reel fishery cannot be compared to the trawl fishery. First, the gear is less lethal, particularly in the spring when the fish are in shallow waters. Second, a similar catch allowance for rod and reel fishermen would result in a directed fishery that would produce high catch rates on spawning fish, potentially activate latent effort, and create enforcement and compliance issues and user group conflicts. These

concerns were well documented in the early part of the 2010s and were the rationale for moving the directed hook and line fishery to the summer.

No further comments were made. The Chairman called for a motion. **Bill Doyle made a motion to adopt DMF's recommendation as provided. The motion was seconded by Sooky Sawyer. The motion was approved by unanimous consent (7-0).**

#### Period II Commercial Summer Flounder Management

Dan provided the MFAC with his recommendation to amend the rules affecting the Period II (April 23 – December 31) commercial summer flounder fishery. For the inshore June 10 – October 31 season, increase the daily trip limits for trawlers from 300 pounds to 400 pounds and for hook and line fishermen from 200 pounds to 250 pounds. Then for the offshore November 1 – December 31 season, eliminate closed fishing days (Fridays and Saturdays) and allow the possession and landing of up to 1,000 pounds of summer flounder per trip if greater than 5% of the annual quota remains available or 500 pounds of summer flounder per trip if 5% or less of the annual quota remains available.

Similar to the commercial black sea bass, there were some concerns regarding the potential impact of the pandemic on summertime markets. However, given the elevated quota and recent performance, Dan argued these recommended changes were justifiable. If market conditions are such that it requires in-season regulatory adjustments, then DMF can propose such actions at an August or September meeting.

Mike Pierdinock stated that there was interest among active fishery participants in maintaining status quo limits. Dan stated that he heard and read similar comments. However, he did not support maintaining status quo limits because recent performance indicates that would leave sizeable amounts of quota on the table at the end of the year, and that was not in the best interest of the seafood industry. Additionally, his recommendation was informed by seafood dealers who indicated that low market prices in 2019 were driven by the size of the fish being caught - not an overall surplus of supply - and the market could absorb more fish without further depressing the ex-vessel value. Dan opined that an increase in the limits could help compensate fishermen for a reduced ex-vessel value if the size class of the commercial catch is again small.

No further comments were made. The Chairman called for a motion. **Kalil Boghdan made a motion to adopt DMF's recommendation as provided. The motion was seconded by Sooky Sawyer. The motion was approved by unanimous consent (7-0).**

#### Open Access Horseshoe Crab Trip Limit for Trawlers

Dan recommended the MFAC approve a 75 crab commercial horseshoe crab limit for trawlers without a regulated fishery horseshoe crab bait endorsement. This open access limit would replace the LOA program that DMF established in 2012 to accommodate an incidental catch of horseshoe crabs by trawlers fishing in the summer flounder fishery. The LOA program afforded these trawlers a 300-crab limit during open commercial

fishing days with the open commercial summer flounder fishery. The limited access limit for trawlers with a regulated fishery horseshoe crab bait endorsement would remain at 300 crabs.

This change was being made in response to 2019 fishery performance. The commercial horseshoe crab quota was taken on September 1. Accordingly, all trawlers were required to discard crabs caught while fishing for summer flounder in September and October. The lack of supply of fresh crabs also created some concern from the biomedical industry, which has an arrangement with certain bait dealers to bleed crabs before they are sold to the bait market. In response, DMF worked with the biomedical firm and two fishermen to develop biomedical trawl pilot program to help meet some of that demand. By limiting the number of crabs non-permitted fishermen may take, the quota may be extended later into the fall, reducing regulatory discarding and further ensuring biomedical crab demands are met. Based on conversations with industry members, a 75-crab limit was chosen as a reasonable limit for incidental catch.

Mike P. asked if this measure was supported by the biomedical industry. Jared Silva stated that the biomedical firm did not provide a public comment. However, representatives attended the December industry meeting when this was first discussed and did not object to it.

Kalil and Dan discussed the condition of the crabs caught by the trawl fleet. Dan stated that the nets are not heavily compacted when fishing large mesh, so most crabs are in good enough condition for the biomedical firm to borrow from the bait dealer for bleeding.

No further comments were made. The Chairman called for a motion. **Sooky Sawyer made a motion to adopt DMF's recommendation as provided. The motion was seconded by Tim Brady. The motion was approved by unanimous consent (7-0).**

#### Sand Lance Possession Limits

Dan McKiernan recommended the MFAC vote to adopt a 200 pound sand lance possession and landing limit. Given the ecological importance of this forage species, there is a strong interest in preventing the proliferation of such an industry. While arguments have been made that current gear regulations are sufficient to constrain the development of an industrial fishery, there remains some concern that an industrial fishery could flourish in response to bait (or reduction) demands. Dan opined that the 200 pound limit would eliminate this concern while continuing to accommodate existing artisanal fisheries.

No further comments were made. The Chairman called for a motion. **Kalil Boghdan made a motion to adopt DMF's recommendation as provided. The motion was seconded by Charlie Quinn. The motion was approved by unanimous consent (7-0).**

#### Sea Herring Management in Area 1A

Dan recommended that the MFAC approve: (1) a 2,000-pound incidental catch and small-scale fishery limit for vessels fishing for herring in Area 1A, which will apply to state-only permit holders and federal category permit holders during closed periods; and (2) update language and terminology regarding the MA/NH Spawning Area Closure to better align to the ASMFC's Atlantic Sea Herring FMP.

Jared Silva provided some additional background information regarding the management of the Area 1A through the ASMFC by landing limits, days out and a fall spawning closure.

Chairman Kane asked for clarification on the so-called "5-day notice" requirement. Jared stated DMF was required to give the fleet 5-days notice regarding the implementation or extension of the spawning MA/NH spawning closure. However, this was no longer required by the FMP and DMF was seeking to rescind it from its regulations.

No further comments were made. The Chairman called for a motion. **Kalil Boghdan made a motion to adopt DMF's recommendation as provided. The motion was seconded by Charlie Quinn. The motion was approved by unanimous consent (7-0).**

#### Edible Crab Management

Dan recommended the MFAC vote to: (1) consolidate existing cancer crab and blue crab regulations in a single regulatory section; (2) define the term "edible crab" to exclude invasive species (e.g., green crabs); and (3) clarify that a non-commercial lobster and edible crab permit is needed only to take lobsters and edible crabs by five or six sided traps and is not needed to harvest edible crabs by other means (e.g., dip net).

McKiernan noted that this was mostly a housekeeping action aimed at consolidating existing crab regulations. However, there was one interesting aspect of this rule change. State law requires a Coastal Lobster Permit to land and sell lobsters and edible crabs. However, the term "edible crabs" is not defined. It was historically designed to address those native species of cancer crabs commonly caught in lobster traps. However, there is now a growing food market for invasive green crabs, and there is some concern that a lobster permit is needed if you are going to sell these green crabs for consumption. DMF did not want its permitting system to discourage the eradication of this invasive species, so by defining "edible crabs" to mean native species only, individuals can harvest green crabs for food markets without a Coastal Lobster Permit.

No comments were made. The Chairman called for a motion. **Lou Williams made a motion to adopt DMF's recommendation as provided. The motion was seconded by Tim Brady. The motion was approved by unanimous consent (7-0).**

#### **FINAL DECISION ON PERMITTING REGULATION CLARIFICATIONS ITEMS**

Story Reed reviewed these final permitting decisions. These final actions will: (1) allow a

minimum trap allocation transfer of 10 traps, rather than the current 50-trap rule for lobster fisheries subject to effort control plans; (2) eliminate the language that requires coastal lobster permits for areas subject to effort control plans to be retired once trap allocations are reduced to less than 50 traps; (3) clarify that for DMF to waive the coastal lobster permit transfer performance criteria in certain circumstances (i.e., death, disability, military duty) the permit must have been “actively” fished (consistent with the regulations) prior to the qualifying circumstance; (4) make explicit that the initial sale of fish from any commercial fisherman must be to a primary buyer; and (5) codify that the for-hire permit converts the recreational fishing activity of paying customers on a for-hire trip and the private recreational fishing activity of the named individual.

As a point of order, Jared Silva explained that as these final actions affect permitting they do not require a vote by the MFAC. However, DMF was seeking the MFAC’s input.

Kalil Bogdhan asked how a dealer becomes a primary buyer. Story stated there are several types of dealer permits – generally the wholesale and retail dealer permits - that may be given primary buyer status and then they are subject to state dealer reporting requirements. DMF publishes a list of all primary buyers on the website that fishermen may easily access.

Kalil then asked if commercial fishermen can become primary buyers to sell their catch directly to the public. Story stated that a retail boat dealer permit allows a commercial fisherman to sell their whole live lobsters and crabs and whole finfish directly to the public. In this instance, the commercial fisherman would be their own primary buyer and would report that catch both as a dealer and as a fishermen. The retail boat permit does not allow them to process (i.e. filet) the catch or purchase and sell catch from another fishermen. Dan McKiernan added that wholesale trucks and wholesale brokers are not authorized to become primary buyers unless they have a brick-and-mortar facility where records are kept.

## **DISCUSSION OF IMPACTS OF COVID-19 ON SEAFOOD AND FISHING INDUSTRY**

Dan stated that he has been in contact with seafood and fishing industry representatives regarding the impact the pandemic and wanted to hear directly from MFAC members regarding how the pandemic has affected their businesses.

Sooky Sawyer stated the lobster industry was very hard hit. Most dealers are closed and not accepting any product. Revenue is primarily occurring through direct sale to the public via the retail boat permit. Local consumer demand was not a large enough market to absorb product as fishing begins to ramp up in the spring. If the restaurant industry remains closed, the economic impact will be severe.

Dan asked if MLA was looking into federal relief programs. Sooky stated that they were trying to get fishermen to participate in the programs, but he did not expect the monies to turnaround quickly.

Bill Doyle stated the aquaculture industry came to an abrupt halt in March. Farming activities continue, but he has had to lay off employees because the product cannot be sold. Bill stated that he is trying to take advantage of federal relief programs.

Dan asked if aquaculture businesses were planning to buy seed for planting this year. Bill stated that he purchased seed last year for this year, so he was not pressured to make this decision. However, he also sells seed and there is no demand at present.

Charlie Quinn stated that only half his boats are fishing. Price for sea scallops was going down in response to demand. While some product goes to frozen markets and retailers, about 70% of scallops are sold to restaurants. Until restaurants are back up and running, the sea scallop market would not recover.

Mike P. stated that along the coast, reservations for for-hire trips were being cancelled. Marinas were also understaffed and boats were not getting worked on. He was also concerned about the impact an economic recession would have on the for-hire industry over the longer term.

Lou Williams stated that he was working on a pilot program with DMF to trap waved whelks. However, he would not be setting any gear because there is no market and the dealer he was working with closed up. He was considering preparing his gillnets to fish groundfish this spring, but is concerned about the ability to market the fish.

### **OTHER BUSINESS**

Dan McKiernan stated that he received Bill Doyle's synopsis on the local control of aquaculture on March 31. He intended to work with staff to review it over April, and he would address it as a formal discussion item at the next meeting. On the topic of shellfish, Dan added that MSI's Scoping Committee Report was completed, the Assessment Committee Report was being finalized and he intended to reconvene the Task Force this summer.

### **COMMISSION MEMBER COMMENTS**

Kalil Boghdan thanked DMF and DFG staff for putting together the virtual meeting and expressed his surprise for how well it worked out.

Bill Doyle asked that MFAC members read over his synopsis on the local control of aquaculture before the next meeting. He stated that he would like to see the MFAC and DMF obtain more control and oversight of how municipalities manage shellfish aquaculture.

Sooky Sawyer stated the MA lobster industry was interested in how the ASMFC would address sea herring decisions in May and how these decisions may restrict access to bait.

Tim Brady stated that the for-hire industry was already struggling in response to low catch limits. Given the seasonality of the industry, he was very concerned the pandemic may eliminate their profitability this year.

Charlie Quinn thanked DMF for setting up the virtual meeting. He was hopeful that everyone could remain positive and healthy.

Lou Williams stated that he would like to see DMF consider a small mesh gillnet pilot program to target haddock in 2021.

Mike P. asked DMF to provide him with any information they had on local attempts to market seafood and support local fishermen. Dan stated he would have Wendy Mainardi reach out to him.

Mike P. then asked if DMF expected the April 28 Recreational Advisory Panel would also be held virtually. Dan state that given the success of this MFAC meeting, he expected it would be.

Ray Kane thanked DMF staff and MFAC members. He addressed the upcoming meeting schedule and stated that the April 16 meeting should be canceled and the May meeting should be rescheduled. Dan and Ron agreed. Jared Silva stated he would cancel the April 16 meeting and work to find a suitable date for a May meeting.

Commissioner Amidon thanked Jared Silva and the MFAC for putting together the meeting.

#### **ADJOURNMENT**

The Chairman requested a motion to adjourn. **Bill Doyle made a motion to adjourn. The motion was seconded by Lou Williams. The motion was approved by unanimous consent.**

## **MEETING DOCUMENTS**

- April 1, 2020 MFAC Business Meeting Agenda
- February 20, 2020 MFAC Business Meeting Draft Minutes
- Recreational Bluefish Recommendation
- Recreational Striped Bass Recommendation
- Commercial Striped Bass Recommendation
- Commercial Menhaden Recommendation
- Commercial Black Sea Bass Recommendation
- Commercial Summer Flounder Recommendation
- Commercial Open Access Horseshoe Crab Limit for Trawlers Recommendation
- Sand Lance Possession Limit Recommendation
- Sea Herring Recommendation
- Edible Crab Recommendation
- Permit Housekeeping Recommendation
- Summary of Cape Cod Canal Fishing Issues Meeting with ACOE and MEP
- Summary of COVID-19 Impacts on Seafood Industry
- Synopsis of Shellfish Aquaculture Management (Bill Doyle)
- NEFMC April Meeting Update

## **FUTURE MEETINGS**

**9AM  
May 21, 2020  
Virtual Meeting**

**9AM  
June 18, 2020  
DFW Field Headquarters  
Westborough, MA**

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter** MARINE FISH AND FISHERIES  
**130****Section 1A** DIVISION OF MARINE FISHERIES

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Section 1A. The division of marine fisheries shall be within the department in the executive office of environmental affairs and shall be under the administrative supervision of a director who shall be called the director of marine fisheries. The director of the division of marine fisheries shall be appointed and may be removed by the commissioner of the department of fish and game with the approval of the marine fisheries advisory commission. The said division of marine fisheries shall administer all the laws relating to marine fisheries as appearing in chapter one hundred and thirty and any other general or special laws, except as pertain to the enforcement thereof. It shall be responsible for the biological development of marine fish and fisheries. Said division shall co-operate with all departments, boards, officials and institutions of the commonwealth or its subdivisions that may be concerned in any way with matters under its supervision. It shall co-operate with adjoining states and with the United States of America, or any agency thereof, with foreign countries, and any other agency, as may be authorized by the

general court, and receive and dispense such funds from any of such agencies, states or governments as may be authorized by the general court.

## **Part I** ADMINISTRATION OF THE GOVERNMENT

### **Title XIX** AGRICULTURE AND CONSERVATION

#### **Chapter** MARINE FISH AND FISHERIES **130**

#### **Section 1B** MARINE FISHERIES ADVISORY COMMISSION

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Section 1B. There shall be in the division of marine fisheries a commission to be known as the marine fisheries advisory commission hereinafter called the commission, which shall consist of nine members, qualified in the field of marine fisheries by training and experience, to be appointed by the governor with the approval of the council. As the term of a member expires, his successor shall be appointed for a term of three years, except that initially three members shall be appointed for terms of two years and three members shall be appointed for terms of one year. The governor may also, with the like approval, fill any vacancy in an unexpired term. No member of the commission shall hold any other position in the department while serving as such, nor for a period of two years thereafter.

The commission shall annually elect its own chairman and clerk and shall keep accurate records of its meetings and hearings and shall meet at least quarterly and at the call of the chairman. A quorum to conduct business shall consist of five members. The commission shall hold public hearings

relative to matters within the jurisdiction of the division and shall make recommendations to the director for the proper management and development of the marine fisheries of the commonwealth. The director or his designee shall attend all meetings and hearings of the commission and may present evidence thereat and shall include in his annual report a report of the commission. The members of the commission shall serve without compensation but shall be reimbursed for actual expenses incurred in the performance of their official duties.



# Atlantic States Marine Fisheries Commission

## 2020 Spring Meeting Webinar Summary

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*Sustainable and Cooperative Management of Atlantic Coastal Fisheries*

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2020 Spring Meeting Webinar  
May 5 & 6, 2020

Toni Kerns, ISFMP, or  
Tina Berger, Communications  
For more information, please contact  
the identified individual at  
703.842.0740

### Meeting Summaries, Press Releases and Motions

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## **ATLANTIC HERRING MANAGEMENT BOARD (MAY 5, 2020)**

### ***Meeting Summary***

The Atlantic Herring Management Board met to review and consider final action on Draft Addendum III to Amendment 3. Addendum III proposes options to better manage the Area 1A (inshore Gulf of Maine) sub-annual catch limit (ACL) under low quota scenarios. These options include additional tools for allocation distribution and expanding the landing provisions across different permit categories within the days out program. Public comment period on the Draft Addendum took place in February and March, with four public hearings held in three jurisdictions (Maine, New Hampshire, and Massachusetts).

At the time of the meeting, a final rule for the New England Fishery Management Council's (Council) Amendment 8, which proposes a long-term acceptable biological catch (ABC) control rule, had not been published by NOAA Fisheries. The proposed ABC control rule could result in low Atlantic herring ACLs should the resource continue to be below its biomass target. Amendment 8 also proposes prohibiting the use of midwater trawl gear inshore of 12 nautical miles from the U.S./Canada border to the Rhode Island/Connecticut border and inshore of 20 nautical miles off the east coast of Cape Cod. These proposed measures could limit when and where midwater trawl gear can be fished in Area 1A. Additionally, an assessment update for Atlantic herring will be finalized later this summer that may impact specifications for the 2021 fishing season.

Given these items, and an interest by Commission and Council leadership to meet and discuss management authority in Area 1A, the Board moved to postpone action on Addendum III. Once the final rule has been published on Amendment 8 and Commission/Council leadership have met, the Board will take up final action on Addendum III.

For more information, please contact Kirby Rootes-Murdy, Senior Fishery Management Plan Coordinator, at [krootes-murdy@asmfc.org](mailto:krootes-murdy@asmfc.org) or 703.842.0740.

### ***Motions***

**Move to postpone final action on Draft Addendum III until after a final rule on Amendment 8 is published and Council/Commission leadership can meet to discuss herring management.**

Motion made by Ms. Ware and seconded by Mr. White. Motion passes (9 in favor).

## **ATLANTIC MENHADEN MANAGEMENT BOARD (MAY 5, 2020)**

### ***Meeting Summary***

The Atlantic Menhaden Management Board received an update on additional analyses conducted by the Ecological Reference Points (ERP) Work Group, as requested by the Board at the 2020 Winter Meeting. At that meeting, the ERP Work Group presented example ERPs developed as part of the 2019 benchmark assessment. The example ERPs were defined as the level of Atlantic menhaden fishing mortality ( $F$ ) that would maintain Atlantic striped bass at its biomass target or threshold when Atlantic striped bass was fished at its  $F$  target, while all other focal species (bluefish, Atlantic herring, weakfish, spiny dogfish) in the ERP model are fished at status quo levels (i.e., 2017). However, an important

conclusion of the benchmark assessment is that the exact values and definition of the ERPs depend on ecosystem management objectives.

The additional analyses explored the sensitivity of the ERPs to different assumptions about ecosystem conditions (i.e., different biomass levels and  $F$  rates on the other focal species). The ERP Work Group presented the results of these analyses, including the values of the ERPs under the different scenarios and the probability of exceeding the respective ERPs under a total allowable catch of 216,000 metric tons (status quo) for 2019-2021. The ERP Work Group also presented tradeoff curves and graphs to illustrate the tradeoffs between the management objectives for different species.

The ERP Workgroup and Atlantic Menhaden Technical Committee noted several sources of uncertainty in the analyses that need further exploration to better understand the sensitivity of the model and the uncertainty in the ERPs. These uncertainties included differences between the fishing rates in the Fishery Management Plans and in the ERP model for some species, a possible overestimation of the importance of Atlantic herring for striped bass diets, and the inability of weakfish to rebuild under any fishing rates explored in the analyses. The ERP Work Group therefore recommended additional analyses to explore (1) alternate Atlantic herring biomass scenarios given the uncertainty in future Atlantic herring recruitment; (2) sensitivity to model parameterization of the Atlantic herring – Atlantic striped bass relationship; and (3) scenarios where other ERP focal species are fished at their single-species  $F$  reference points. These analyses will help the Board to better understand the sensitivity of the ERPs to different ecosystem assumptions and sources of uncertainty, as well as provide context for Board discussions around risk and ecosystem management objectives.

The Board tasked the ERP Work Group with conducting the recommended analyses. The results will be reviewed at the August meeting when the Board is expected to consider a motion to adopt ERPs for Atlantic menhaden.

For more information, please contact Max Appelman, Fishery Management Plan Coordinator, at [mappelman@asmfc.org](mailto:mappelman@asmfc.org) or 703.842.0740.

### ***Motions***

**Task the ERP workgroup to continue with analyses to address the listed recommended scenarios before the August board meeting**

Motion made by Ms. Patterson and seconded by Ms. Meserve. Motion passes unanimously.

## **ATLANTIC COASTAL COOPERATIVE STATISTICS PROGRAM COORDINATING COUNCIL (MAY 5, 2020)**

### ***Meeting Summary***

The ACCSP Coordinating Council met to review the activities of the Funding Subcommittee and to take final action on the FY2021 Request for Proposals. The Council approved the draft RFP as presented by staff. As part of the consent agenda, the Council also approved minutes from October 2019 meeting, committee updates, and program updates.

The Coordinating Council was presented an MRIP draft report to Congress on State Partnerships. Comments are due to Geoff White, [Geoff.white@accsp.org](mailto:Geoff.white@accsp.org), by May 20<sup>th</sup>.

For more information, please contact Geoff White, ACCSP Director, at [Geoff.white@accsp.org](mailto:Geoff.white@accsp.org) or 703.842.0740.

### ***Motions***

#### **Motion to approve the RFP by consent.**

Motion made by Coordinating Council Chair Lynn Fegley. Motions passes with no objections.

### **TAUTOG MANAGEMENT BOARD (MAY 5, 2020)**

#### ***Meeting Summary***

The Tautog Management Board met to consider a conservation equivalency (CE) proposal from the State of Rhode Island. The proposal outlines a one fish increase in the bag limit for the party/charter industry during the fall fishing season. The proposal would create a different set of management measures not only between Massachusetts and Rhode Island, but also between different fishing modes within Rhode Island on the same water bodies. Reasons cited for the proposal were negative economic impacts the industry has experienced since the current regulations were implemented in 2018 (a reduction in the general creel limit from 6 to 5). Additionally, it was noted that given the current stock status (not overfished and overfishing is not occurring) in the Massachusetts-Rhode Island (MARI) Region, the proposed changes would not negatively affect the stock. As part of the analysis presented in the proposal, harvest was estimated to increase by less than 1% from 2018 harvest levels under the proposed measures given the for-hire sector makes up a small proportion of the state's annual harvest. In submitting the CE proposal for Board review, the Plan Review Team (PRT), Technical Committee (TC), Law Enforcement Committee (LEC), and the Advisory Panel (AP) all reviewed the proposal and provided feedback for the Board's consideration. The PRT found the proposal was lacking standard information required as part of submitting a CE proposal, including how the proposal aligns with the FMP objectives, as well as monitoring of potential impacts from the proposed measures. Additionally, given the proposal would result in an increase in harvest, and there were no offsetting changes in size limit or season length, the PRT found the proposal was more a request to change current recreational measures than a CE proposal as it was not 'conservation neutral'. Members of the TC and AP both agreed with the PRT's assessment. Lastly, the LEC noted points previously highlighted in its January 2020 memo regarding the challenges of enforcing differing measures on shared water bodies as well as differing measures by fishing mode. Taking into consideration feedback from the PRT, TC, LEC, and AP, the Board did not approve the proposal.

Following the Board vote and under other business, a number of Board members expressed concern about the overall impacts the current COVID-19 pandemic poses to recreational fisheries in general and the tautog fishery in particular, both for the for-hire industry as well as private anglers. Moving forward, the Commission's Executive Committee will initiate a discussion on how to provide guidance for considering changes to 2020 recreational measures to accommodate the challenges posed by the COVID-19 pandemic.

For more information, please contact Kirby Rootes-Murdy, Senior Fishery Management Plan Coordinator, at [krootes-murdy@asmfc.org](mailto:krootes-murdy@asmfc.org) or 703.842.0740.

### ***Motions***

**Move to approve the Rhode Island conservational equivalency proposal to increase the bag limit for the party and charter mode to 6 fish during the fall season beginning on October 15, 2020. All other tautog recreational management measures will remain unchanged.**

<u>Size Limit (inches)</u>	<u>Possession Limits (number of fish/person/day)</u>	<u>Open Seasons</u>
16"	3 fish (up to 10/private vessel)	March 1 – May 31 August 1 – October 14
	0	June 1 – July 31
	5 fish private sector (up to 10/private vessel)	October 15 – December 31
	<b>6 fish Party/Charter</b>	

Motion made by Dr. McNamee and seconded by Mr. Luisi. Motion fails (1 in favor, 9 opposed).

### **ATLANTIC STRIPED BASS MANAGEMENT BOARD (MAY 5, 2020)**

The Atlantic Striped Bass Management Board met to review predicted fishery performance in 2020 based on final Addendum VI measures and new stock projections with updated data. Addendum VI called for an 18% reduction in total removals relative to 2017 levels in order to achieve the fishing mortality ( $F$ ) target in 2020. To achieve this, states were required to implement the Addendum VI measures for the ocean and Chesapeake Bay fisheries, although some states implemented alternative measures through the fishery management program's conservation equivalency (CE) process. As a result, the total overall predicted reduction in 2020 would likely differ from the 18% reduction originally calculated, because that calculation assumed all states would implement the Addendum VI measures.

Overall, the Technical Committee (TC) concluded the combination of Addendum VI and CE measures implemented in 2020 would not significantly undermine the Board's efforts to end overfishing and reduce  $F$  to the  $F$  target in 2020. The TC calculated that final 2020 measures would result in an overall predicted 15% reduction compared to the 18% reduction calculated for the consistent measures. The probability that  $F$  in 2020 will be at or below the  $F$  target was projected to be lower than in the original analysis, although the confidence intervals of the original and updated projections almost entirely overlap. However, these calculations assume that fishing effort in 2020 will be similar to effort in 2016-2017. This is always a source of uncertainty in recreational bag and size limit analysis, and COVID-19 only increases uncertainty about effort and removals in 2020.

Given this is the first time the Board met via webinar, the decision was made for this meeting to be informational only. Consequently, action on two postponed motions was deferred to the August meeting. These motions consider (1) accountability measures specific to Addendum VI, and (2) initiating an Amendment to revisit and address a suite of management issues including fishery goals and objectives, reference points, management triggers, stock rebuilding, area-specific management, and commercial allocation. Alongside these motions, the Board had also expressed its intent to revisit the management program's CE provision and to pursue accountability measures for recreational striped bass fisheries in the future. In the interim, the Board decided to form a Work Group (WG) of Board members to further discuss these and any other issues that should be considered in a future management document, with the WG reporting back to the Board in August. This will allow work to

continue on these important issues to the extent practical during these challenging times. WG meetings will be open to the public and progress reports will be made available (when possible) to ensure transparency of WG activities.

For more information, please contact Max Appelman, Fishery Management Plan Coordinator, at [mappelman@asmfc.org](mailto:mappelman@asmfc.org) or 703.842.0740.

### ***Motions***

No motions made.

## **ASMFC BLUEFISH MANAGEMENT BOARD & MID-ATLANTIC FISHERY MANAGEMENT COUNCIL (MAY 6, 2020)**

### ***Meeting Summary***

The Commission's Bluefish Management Board (Board) met jointly with the Mid-Atlantic Fishery Management Council (Council) via webinar to provide guidance on the development of draft management alternatives for the Bluefish Allocation and Rebuilding Amendment. First, the Board and Council were presented a summary of public comments received through the supplemental scoping period that occurred in February and March of this year. Next, the Board and Council reviewed Fishery Management Action Team (FMAT)/Plan Development Team (PDT) recommendations on the scope of the amendment. The Board and Council determined that the following issues be considered for further development:

- Fishery management plan goals and objectives
- Recreational/commercial allocations
- Commercial allocations to the states
- Recreational/commercial sector transfers
- Commercial state-to-state quota transfers
- Rebuilding plan
- Sector specific management uncertainty
- Separate allocations for the for-hire and private sectors of the recreational fishery
- *De minimis* provision to relieve states from having to adopt recreational fishery regulations

In the coming weeks, the FMAT/PDT will meet to discuss the guidance provided by the Board and Council and prepare an initial range of management alternatives. The two management bodies are expected to reconvene jointly via webinar in June to refine draft management alternatives. For more detailed information regarding the amendment process and timeline visit the [bluefish amendment action page](#).

For more information, please contact Dustin Colson Leaning, Fishery Management Plan Coordinator, at [dleaning@asmfc.org](mailto:dleaning@asmfc.org) or 703.842.0740.

### ***Motions***

No motions made.

## **ASMFC SUMMER FLOUNDER, SCUP AND BLACK SEA BASS MANAGEMENT BOARD & MID-ATLANTIC FISHERY MANAGEMENT COUNCIL (MAY 6, 2020)**

### ***Meeting Summary***

The Commission's Summer Flounder, Scup, and Black Sea Bass Board (Board) met jointly with the Mid-Atlantic Fishery Management Council (Council) via webinar to discuss two issues: (1) management response to COVID-19 pandemic fishery impacts; and (2) the development of draft alternatives for the Summer Flounder, Scup, and Black Sea Bass Commercial/Recreational Allocation Amendment.

### **COVID-19 and Recreational Fisheries**

At the start of the meeting, Commission leadership addressed concerns expressed by various Board members about overarching impacts of the ongoing COVID-19 pandemic on recreational fisheries in general, and the summer flounder, scup, and black sea bass fisheries in particular. Moving forward, the Commission's Executive Committee will start a discussion to develop guidance for states to consider changes to 2020 recreational measures to adapt to the challenges posed by COVID-19. States should forward suggestions to Commission staff.

### **Summer Flounder, Scup, and Black Sea Bass Commercial/Recreational Allocation Amendment**

The Board and Council reviewed the summary of public comments provided during the Amendment scoping process, comments from the Advisory Panels (APs) on types of alternatives to be considered, and recommendations from the Plan Development Team (PDT)/Fishery Management Action Team (FMAT) on the scope of issues to be included in the Amendment. The two bodies then discussed which types of alternatives should be further developed by the FMAT for consideration by the Board and Council at their next joint meeting.

The Board and Council supported exploration of a variety of approaches for potential modifications to the commercial and recreational allocations for summer flounder, scup, and black sea bass. These include status quo, allocations based on different data or time series, allocation percentages intended to produce approximately status quo harvest by sector compared to recent years prior to catch limit revisions, separate allocations for the for-hire and private sectors of the recreational fishery, a "harvest control rule" approach, dynamic allocations, and allocation transfers between sectors. Acknowledging widespread concerns voiced by the public and AP members regarding the recreational data used for management, the Council and Board also supported the development of draft alternatives to address recreational accountability and catch accounting. Finally, both bodies agreed that alternatives to allow the sale of allocations between sectors and allocation set-asides should not be included in this amendment. Based on this feedback, the FMAT will develop a range of draft alternatives for Council and Board review at the next joint meeting, which is expected to occur via webinar in June.

### ***Motions***

No motions made.



**Daniel J. McKiernan**  
Acting Director

# Commonwealth of Massachusetts

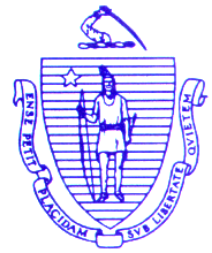
## Division of Marine Fisheries

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**Kathleen Theoharides**  
Secretary

**Ronald S. Amidon**  
Commissioner

**Mary-Lee King**  
Deputy Commissioner

### MEMORANDUM

TO: Marine Fisheries Advisory Commission (MFAC)

FROM: Daniel J. McKiernan, Acting Director

DATE: April 30, 2020

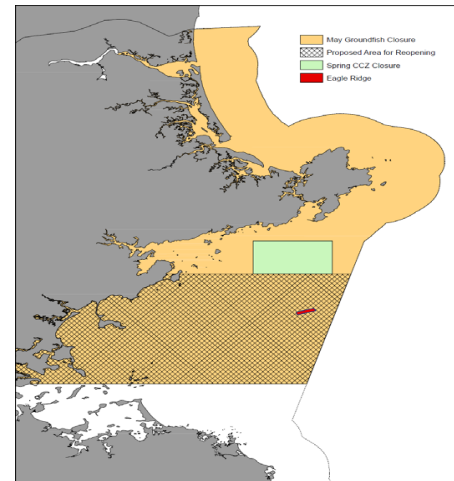
SUBJECT: **GE Request for Opening May Groundfish Closure**

#### Purpose

Given the flurry of COVID-19 related emergency actions that have come before the Division of Marine Fisheries, I wanted to take a moment to update MFAC members on a recent emergency action request that I have not supported.

#### Background:

Three Groundfish Endorsement (GE) gillnetters requested opening the May groundfish rolling closure [322 CMR 8.05(3)] in response to negative economic and fishery impacts from COVID-19. The closure runs from the 42°20'N (Boston) to MA/NH border and includes sensitive spawning grounds (e.g., Eagle Ridge and Spring Cod Conservation Zone). If a full opening could not be accommodated, they also requested a limited opening that would roll-up the southern boundary from the 42°20'N (Boston) to the 42°30'N (Marblehead). While this excludes the Spring CCZ but still includes Eagle Ridge (Map 1). For all these reasons cited below, I did not support the request to gain access to the historical May closure.



**Map 1.** Overlay of groundfish related closures and sensitive spawning grounds in May.

#### Spawning

A similar request was rejected in 2017 after considering the negative impact an opening would have on GOM cod spawning protection, which the MFAC has supported. Spawning considerations and GOM cod stock status concerns remain as strong as ever. May and June represent the peak of spring spawning for cod, and spring-spawners are the most imperiled sub-population of GOM cod.

#### Mortality

The groundfish state waters sub-components are a way to account for estimated state waters catch in the federal accounting of total catch. The federal FMP does not allow for the roll-over of any

underutilized state waters sub-component from one Fishing Year (May 1 – April 30) to the next fishing year. Moreover, as we have witnessed in past years, overharvesting the state-waters set-aside can cause total catch to exceed the Acceptable Biological Catches (ABCs) *thus triggering a pound-for-pound payback by the federal fishery.*

Given GE fishermen are already subject to a low daily trip limits (e.g., 200-lbs for Gulf of Maine cod), DMF utilizes time/area closures to align estimated GE effort to the sub-components. However, lack of real-time catch data and monitoring limits this tool to annual review and the state fishery lacks a mechanism to shut the fishery down in season if set-asides are going to be exceeded. Accordingly, opening up May increases the likelihood that the conditional April closure will not be lifted in 2021 and that the state waters sub-components for certain stocks (e.g., Gulf of Maine cod) may be exceeded triggering accountability measures that would impact the federal fleet.

#### Emergency Action

Unlike April, the May closure is non-conditional and cannot be lifted by a declaratory action. Amending the May closure would require a change in regulation. Further, implementing a change for May 1, 2020 would necessitate the use of the Director's emergency regulatory authority.

I do not believe the use of this emergency authority is justifiable due to my above stated substantial concerns regarding how an opening may impact cod spawning and potentially lead to the overutilization of the set-asides and produce federal accountability measures. Any proposed changes to the management of the groundfish fishery in state waters should follow normal rule making procedure. This would ensure the proposal was thoroughly analyzed by DMF, reviewed and debated by our MFAC, and subject to robust public comment from stakeholders (including federal permit holders, recreational fishermen, and NOAA Fisheries).

#### Mitigation for COVID Impacts

Clearly fishermen are facing a drastically changed world with loss of markets and impacts of social-distancing measures on safe operation. Federal and state groundfishermen may not be able to mitigate any losses by gaining additional time/area access, but several general economic relief packages have been created, including the Paycheck Protection Program. Even unemployment benefits, traditionally unavailable to self-employed fishermen, have been made available. However, all this can be difficult to navigate even with a staff accountant or financial officer. Organizations like the Massachusetts Fishermen's Partnership have been onboarding additional staff to help navigate fishermen through and find the necessary economic relief. DMF continues to work with the MFP to identify other actionable relief requests such as no-fee Retail Boat permits.

An additional \$300-million in fishery-specific federal relief funds are pending for distribution to fishermen by the individual member states of the Atlantic States Marine Fisheries Commission (ASMFC), Gulf States Marine Fisheries Commission (GSMFC) and Pacific States Marine Fisheries Commission (PSMFC). NOAA will approve final allocations and individual state spending plans. DMF will keep MFAC and industry apprised as that program takes shape.



**Daniel J. McKiernan**  
*Acting Director*

# *Commonwealth of Massachusetts*

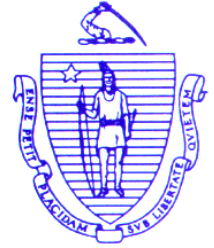
## **Division of Marine Fisheries**

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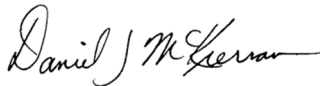
**Charles D. Baker**  
*Governor*

**Karyn E. Polito**  
*Lieutenant Governor*  
**Kathleen Theoharides**  
*Secretary*

**Ronald S. Amidon**  
*Commissioner*

**Mary-Lee King**  
*Deputy Commissioner*

### **MEMORANDUM**

TO: Marine Fisheries Advisory Commission (MFAC)  
FROM: Daniel J. McKiernan, Acting Director   
DATE: May 8, 2020  
SUBJECT: **Ongoing Review and Analysis of Regulation of Shellfish Aquaculture**

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At the February 20, 2020 MFAC business meeting the MFAC approved a motion made by Bill Doyle to develop an analysis that documents the authorities governing shellfish aquaculture and licensing and the municipal regulation of shellfish aquaculture and licensing that will inform an eventual vote by the MFAC on how to move the issue forward<sup>1</sup>. On March 31, 2020, Bill Doyle provided DMF with his “Synopsis of Shellfish Aquaculture Regulation in Massachusetts” and this synopsis was briefly discussed at the April 1, 2020 MFAC business meeting. At that time, I informed the MFAC that my staff would more formally review the document before the next MFAC business meeting and begin addressing the above described motion.

This memorandum is the next step in this iterative process. It provides a general overview of those authorities affecting shellfish aquaculture permitting and regulation and outlines my next steps for furthering this discussion.

#### **Background on Authorities Governing Shellfish and Shellfish Aquaculture**

State law at G.L. c. 130 §§ 17A, 17B, 20, 20A, 52 – 77, 80-82, 92 and 98 (Appendix 1) establishes an extensive management system whereby shellfish resources and shellfish fisheries are managed jointly by the municipality and the state. This includes the licensing and regulation of shellfish aquaculture.

With regards to shellfish management generally, substantial authority is granted to the municipality<sup>2</sup>. The municipality may adopt any regulations, not contrary to law, to manage and permit the harvest of its shellfish resources<sup>3</sup>. This authority also extends to the licensing of shellfish grant sites and regulation of shellfish aquaculture within municipal waters<sup>4</sup>. DMF is

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<sup>1</sup> The exact motion read, “a summary be prepared from an analysis that documents municipal rules, procedures, terms, fees, and responsible municipal management authorities associated with shellfish aquaculture licensing by Massachusetts municipalities...that the topic of municipal rules, procedures, terms, fees, and responsible management authorities associated with shellfish aquaculture licensing be placed on the next MFAC agenda and subsequent agendas until such at time as a vote deciding the direction to be taken.”

<sup>2</sup> G.L. c. 130 §§ [52-65](#) and [§73](#)

<sup>3</sup> G.L. c. 130 § [52](#)

<sup>4</sup> G.L. c. 130 § [57](#)

delegated the authority to: conduct sanitary surveys and classifications of the state's 1.7M acres of shellfish growing areas<sup>5</sup>; manage any shellfish resource or shellfish fishery that occurs in a shellfish growing area classified as contaminated and unsuitable for harvest for direct consumption<sup>6</sup>; directly manage certain commercial surf clam and ocean quahog fisheries, as well as those shellfish fisheries that may occur within the waters under the jurisdiction of the Commonwealth seaward of municipal waters<sup>7</sup>; set baseline standards for the harvest and handling of shellfish<sup>8</sup>; and permit commercial shellfish fishing activity including shellfish aquaculture<sup>9</sup>. Local shellfish officers are authorized to enforce state shellfish laws and regulations, as well as municipal regulations<sup>10</sup>; whereas the Massachusetts Environmental Police are explicitly authorized to enforce state law and DMF regulations<sup>11</sup>. Relevant DMF regulations may be found in Appendix 2.

Specific to shellfish aquaculture, municipalities - through their City Councils and Boards of Selectmen - are provided the primary licensing and regulatory authority. These municipal shellfish aquaculture licenses authorize the portion of waters and tidal flats where aquaculture may occur, the use of specific devices in aquaculture operations, and the harvest of the shellfish. Municipalities may develop regulations for the issuance, renewal and transfer of these licenses. However, state law stipulates licenses are to be issued for periods of not more than 10-years and renewed for periods not to exceed 15-years.

The issuance of these licenses is subject to a habitat review and certification by DMF to ensure the project site does not impact any existing shellfish or other natural resources (e.g., eelgrass)<sup>12</sup>. Additionally, the project may trigger other environmental review processes (e.g., Massachusetts Wetlands Protection Act, Massachusetts Environmental Protection Act, and Massachusetts Public Waterfront Act) based on the scale and siting of the project and the gear types used. Once a municipal aquaculture license is issued, DMF is authorized to issue a commercial aquaculture permit<sup>13</sup>. This permit sets the baseline controls for how the commercial shellfish aquaculture operation is to be conducted to safeguard environmental, public and veterinary health. Additionally, the harvest and handling of shellfish is regulated by DMF<sup>14</sup>.

This is undoubtedly a complex management system. It establishes a strong mechanism for home rule by granting substantial regulatory and permitting authority to the municipality. This fosters opportunities for municipalities to develop innovative management strategies that are best suited for their communities to ensure local concerns are addressed and access to public resources maintained. It also provides the state with the authorities to ensure public trust resources are appropriately managed, environmental harm to wetlands and protected species is minimized, and public health standards critical to ensuring a safe and sustainable supply of shellfish for consumption are met.

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<sup>5</sup> G.L. c. 130 [§§74](#) and [74A](#).

<sup>6</sup> G.L. c. 130 [§§52](#) and [75](#). Regulated at 322 CMR [7.02](#), [10.00](#) and [16.03](#).

<sup>7</sup> G.L. c. 130 [§52](#). Regulated at CMR [6.00](#).

<sup>8</sup> G.L. c. 130 [§§17A](#), [52](#), [69](#), [70](#), [81](#) and [82](#). Regulated at 322 CMR [4.00](#), [6.00](#), [14.00](#) and [16.00](#).

<sup>9</sup> G.L. c. 130 [§§17B](#), [20](#) and [80](#). Regulated at 322 CMR [7.01](#) and [15.00](#).

<sup>10</sup> G.L. c. 130 [§98](#).

<sup>11</sup> G.L. c. 21A [§10B](#).

<sup>12</sup> G.L. c. 130 [§57](#).

<sup>13</sup> G.L. c. 130 [§§17B](#), [20](#) and [80](#). Regulated at 322 CMR [7.01](#) and [15.00](#).

<sup>14</sup> G.L. c. 130 [§§17A](#), [52](#), [69](#), [70](#), [81](#) and [82](#). Regulated at 322 CMR [6.00](#) and [16.00](#)

While this system provides these benefits, it has also been the subject of criticism. The shellfish aquaculture industry has been particularly interested in the efficacy of this management system. It has been noted to DMF that the review and licensing process can create costly barriers to entry. Additionally, home rule has been criticized for encouraging “NIMBYism” and creating disparate governance that may limit growth and opportunity in certain municipalities<sup>15</sup>. These concerns are cohesively captured by Bill Doyle in his synopsis (p 2), when he states:

*...regulations that vary from town to town, as a result of the broad authority granted to municipalities, certainly influence the existence, success or failure of shellfish farms. Variation in municipal regulations with respect to whether or not a town allows shellfish aquaculture, the maximum acreage that a license holder may have, variable “productivity” requirements that dictate how much a farmer must invest annually in their farm, transferability and license tenure terms are among the conditions that not only limit the investment that could be made in shellfish farms but also the beneficial impact that such farms could have on the environment, shellfish resources as well as state and local economies*

### **Ongoing Work**

The Massachusetts Shellfish Initiative (MSI) has completed its Scoping Committee Report. This report outlines six broad categories identified through public scoping as areas of interest and provides priority goals within each category to be considered by the MSI Task Force in their drafting of a Strategic Plan. Included in this are priority goals to strengthen state and local governmental capacity to effectively manage shellfish resources and shellfish fisheries and to encourage economic opportunities around shellfish in a manner that is consistent with the character and interest of individual communities. Additionally, the MSI is finalizing its Assessment Committee Report. This report compiles and describes the existing capacities and resources available in the state that address shellfish resource management, including those related to the support of shellfish aquaculture. The MSI Task Force is tentatively scheduled to reconvene during the early summer to review these reports and begin the drafting of its strategic plan. This strategic planning will provide an opportunity for entities involved in shellfish resource management and shellfish fisheries to provide input regarding potential regulatory and statutory changes that may benefit the state’s shellfish fisheries and shellfish industry.

DMF and other state agencies and offices within the Secretariat of Energy and the Environment continue to work cooperatively to streamline the environmental review process, particularly for commonly used gears. This includes work funded by ASMFC to develop the Massachusetts Aquaculture Permitting Plan (MAPP). The MAPP is being developed to identify how the state is permitting and managing aquaculture for public health, permitting efficiency and sustainability. It will provide a description of the permitting structure focused on best management practices and performance criteria for common aquaculture activities, detailed guidance for aquaculture project proponents, and a framework for addressing cumulative impacts. This will result in the production of a web-based tool that provides a one stop shop for prospective growers to better navigate permitting in MA. The MAPP will be subject to interagency review under the Massachusetts Environmental Protection Act.

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<sup>15</sup> In turn, the limitations imposed by home rule may constrain emerging issues related to the cumulative impacts of aquaculture development in the environmental review process.

Other non-governmental organizations have made efforts to clarify confusing permitting standards and develop best management practices. MA-ShellfAST is a project funded by Woods Hole SeaGrant<sup>16</sup> that DMF worked cooperatively with. It is an interactive GIS-based web tool designed to support shellfish aquaculture siting and permitting in the state. It contains aquaculture permitting and regulatory information based on geography in order to predict and assess regulatory requirements, potential use-based conflicts and biophysical characteristics at potential license sites. ShellfAST is being funded to revisit and update its municipal permitting review in Massachusetts early next year and this effort may be able to be expanded to contemplate tangential permitting issues, such as resident requirements and permit transferability rules. Additionally, best management practice documents have been developed by the East Coast Shellfish Grower's Association<sup>17</sup>, and the Cape Cod Cooperative Extension. The former focuses on best practices along the east coast, while the latter is specific to southeastern Massachusetts<sup>18</sup>.

### **Next Steps**

On page three of Bill Doyle's synopsis, he states that an analysis of municipal shellfish aquaculture regulations will provide a valuable tool for municipalities to develop and modify shellfish aquaculture regulations. I strongly agree with this sentiment. This is an area where DMF will coordinate with SeaGrant's ShellfAST program when they review MA municipal permitting regulations (expected in early 2021). To prepare for this update, DMF will develop a matrix that categorizes and describes municipal shellfish aquaculture regulations.

In his synopsis, Bill also asserts that oyster productivity within a municipality is correlated with industry-friendly regulations and policies. This connection is worth investigating. A review of local regulations and existing best management practices may be helpful to inform what practices should be broadly supported. DMF could then report on these practices to the MFAC, MSI and the Shellfish Advisory Panel (SAP). This could potentially aid municipal management decisions. Also, since much of the existing framework is embedded in the statutes and there is support for legislative fixes, the Legislature will likely seek the expert opinion of DMF, the MFAC, the MSI and the SAP, which will be informed by such a review.

With regards to environmental review permitting, DMF intends to continue to develop the MAPP and its companion website which lays out current permitting standards across the state. This will require we re-engage with the secretariat on this issue to facilitate coordination among the various internal stakeholders. Completion of this task is necessary to enhance permitting efficiency while protecting Commonwealth resources by identifying practices and siting locations that do not require additional layers of environmental review.

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<sup>16</sup> <https://seagrants.noaa.gov/News/ArtMID/468/ArticleID/2709/Woods-Hole-Sea-Grant-Facilitates-Development-of-Aquaculture-Siting-Tool-in-Massachusetts>  
<http://marinegis.org/ArcGISOnline/MAShellfAST/RegulationShellAquaMA.pdf>

<sup>17</sup> East Coast Aquaculture Association's Best Management Practices:  
[https://www.nrcs.usda.gov/Internet/FSE\\_DOCUMENTS/nrcs144p2\\_035319.pdf](https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs144p2_035319.pdf)

<sup>18</sup> Cape Cod Cooperative Extension's Best Management Practices in Southeastern Massachusetts:  
<https://www.capecodextension.org/wp-content/uploads/2013/02/Best-Management-Practices-for-the-Shellfish-Culture-Industry-in-Southeastern-Massachusetts-version-09-04a.pdf>

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter** MARINE FISH AND FISHERIES  
**130****Section 17A** MANAGEMENT OF MARINE FISHERIES

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Section 17A. Upon petition signed by any interested party or upon his own motion, the director shall submit to the marine fisheries advisory commission proposals relating to the management of the marine fisheries. After public hearing, notice of which shall be published in a newspaper of general distribution in the areas affected, the commission shall in writing approve or disapprove such proposals. If any proposal is so approved, the director shall in accordance with such approval adopt, amend or repeal rules and regulations, subject to the approval of the commissioner, which shall govern the following activities only:

- (1) The manner of taking fish;
- (2) The legal size limits of fish to be taken;
- (3) The seasons and hours during which fish may be taken;
- (4) The numbers or quantities of fish which may be taken;

(5) The opening and closing of areas within the coastal waters to the taking of any and all types of fish; provided that no area shall be so opened or closed without the consent of the selectmen of the town or the mayor and council of the city affected thereby. Upon the request of the commission, the selectmen or mayor and council shall hold a public hearing upon the question and shall thereafter notify the commission in writing within forty-five days after such request has been received or consent will be deemed to have been granted.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter** MARINE FISH AND FISHERIES  
**130****Section 17B** AQUACULTURAL ENTERPRISES; PERMITS

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Section 17B. Notwithstanding the provisions of this chapter, the director may, by issuance of a written permit under such terms and conditions as he may impose, authorize the possession and taking of fish at any season and of any size for purposes of propagation, rearing, harvesting or sale in connection with an aquacultural enterprise in which the fish being so propagated, reared and harvested are kept separate from natural stocks of the same species.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter 130** MARINE FISH AND FISHERIES**Section 20** INCREASE IN SUPPLY OF SHELLFISH; CO-OPERATION WITH COASTAL CITIES AND TOWNS; TREATMENT OR PURIFICATION OF SHELLFISH

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Section 20. The director shall assist and co-operate with coastal cities and towns for the purpose of increasing the supply of shellfish and exterminating the enemies thereof within their borders, and for this purpose may expend such sums as may be appropriated therefor. The expenditure of any funds so appropriated shall be apportioned by the director among said coastal cities and towns in such amounts as will, in his opinion, effect the greatest amount of relief and assistance to the shellfish industry; provided, that no money shall be expended hereunder in any such city or town for the purpose of such relief or assistance unless such city or town, within one year prior to the date of such expenditure, shall have expended an amount equal to at least one fourth of the total cost of such work, or shall have contributed services or material of a value, as determined by the director, equal to such proportion. The work of increasing the supply of shellfish and exterminating the enemies thereof in coastal cities and towns aided hereunder shall be done and expenditures therefor shall be made in such manner as the director may

determine and in accordance with rules and regulations which the director shall make with respect thereto, which rules and regulations he is hereby authorized to make and enforce.

The director, in the operation of any plant for the treatment or purification or propagation of shellfish, is hereby authorized and directed to investigate and study methods for the treatment or purification of shellfish taken from areas determined under section seventy-four to be contaminated. The director, in the course of such investigation, shall confer with the state department of public health and may expend for expert, clerical and other services and expenses such sums as may be appropriated therefor. The director shall, before exercising the authority to assist and co-operate as provided in this section, receive the advice of the biologist of the division and a written opinion from him thereon.

The director, acting on behalf of the commonwealth and with the approval of the governor and council, may enter into contracts or agreements with agencies of the federal government or any private institute or corporation for carrying out research and laboratory work necessary for purposes of the treatment or purification of shellfish and the propagation of shellfish in the coastal areas of the commonwealth, and may expend such sums as may be appropriated for the purpose.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter 130** MARINE FISH AND FISHERIES**Section 20A** PROPAGATION OF SHELLFISH; CO-OPERATION WITH  
COASTAL CITIES AND TOWNS

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Section 20A. The director shall assist and cooperate with coastal cities and towns for the purpose of establishing and maintaining a program of self-help to said cities and towns for the cultivation, propagation and protection of shellfish. Funds to carry out the purposes of this section shall annually be appropriated from the Tourism and Industrial Promotion Fund. The director may expend such sums as may be appropriated from said fund, but such sums as are expended therefor shall be conditional upon the expenditure of an equal amount of money by said cities and towns.

The treasurer of each participating city or town shall certify to the director annually the amounts so appropriated by said city or town, which for the purposes of this act shall be equal to the total shellfish department budget.

The director, with the approval of the commissioner, shall certify to the state treasurer on an annual basis all sums pledged to the aforesaid purpose by said cities and towns. Family use areas and recreational

shellfish areas set aside pursuant to section fifty-two which are cultivated, propagated or protected under the funding or provisions of this section shall be open to all inhabitants of the commonwealth upon payment of a reasonable fee.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter 130** MARINE FISH AND FISHERIES**Section 52** TAKING OF EELS, SHELLFISH AND SEA WORMS; AREAS IN WHICH COMMERCIAL TAKING PROHIBITED

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Section 52. The selectmen of a town bordering upon coastal waters, if so authorized by their town, and the board of aldermen or the city council of any city so situated may control, regulate or prohibit the taking of eels and any or all kinds of shellfish and sea worms within such cities and towns and may, from time to time, without other or special authority therefor, make any regulations not contrary to law in regard to said fisheries as they deem expedient, including the times, places, methods, purposes, uses, sizes, quantities and any other particulars of such taking, and may grant permits, and establish the fees therefor, subject to any such regulation, then or thereafter in force. Any such authorizations to said selectmen hereunder shall continue in force until subsequent action of such town shall repeal the same. Any regulations made under authority of this section shall continue in force until the board of aldermen, city council, or selectmen, as the case may be, shall alter, amend, rescind or repeal the same, or the authority of the selectmen to make and enforce such regulations shall be repealed. No city or town shall require a person

to be licensed to take shellfish who is accompanying or operating a boat for a person so licensed and who is not otherwise actively engaged in or assisting in such fishing.

Any regulations made hereunder shall take effect as therein stated, shall be published by posting a copy of the same in the office of the aldermen, city council or selectmen making the same, and in the office of the city or town clerk, and in three or more public places in said city or town, or by publishing the same once in a newspaper, if any, published in said city or town, and by sending a certified copy thereof to the director, twenty-four hours at least before the time set for the same to take effect; provided that the director may, if he deems it necessary for the protection of shellfish in emergency, authorize the making of such regulations effective immediately, in which case publication shall be made within forty-eight hours after the same shall take effect. The records of the aldermen, city council or selectmen, as to the contents of the regulations, and the method and time of publication thereof, or a copy thereof attested by their secretary, shall be prima facie evidence of such facts therein stated. The records of the town as to the instructions to the selectmen, or a copy thereof attested by the town clerk, shall be prima facie evidence of such instructions.

If any city or town bordering on the coastal waters neglects or refuses to take the control of the shellfish, sea worms or eels within its boundaries as provided in this section, such control shall be temporarily exercised by the director for the benefit of such city or town and such authority shall continue until such time as the aldermen or city council of such city or the selectmen under authority of a vote of such town shall take over such control. Nothing in this paragraph shall be construed as authorizing the director to take control of or exercise the authority provided in this

section over the taking of clams from any areas leased from the commonwealth by cities or towns in Essex county as provided in chapter seven hundred and ten of the acts of nineteen hundred and twelve and amendments thereto nor shall such authority extend to the issuance of private shellfish grants as provided in section fifty-seven.

Every city or town which exercises the authority over such coastal fisheries as provided in this section shall set aside an area or areas not then in private control or under municipal cultivation in which the commercial taking of shellfish shall be prohibited and from which shellfish may be taken, for his own family use, by any inhabitant of the commonwealth holding a permit therefor from such city or town. In any city or town issuing such permits to take shellfish for family use, any inhabitant of the commonwealth shall be issued such a permit upon payment of the fee, if any, established therefor; provided, however, that such city or town shall not charge a veteran a fee greater than the fee charged to a resident of such city or town. Such permits shall be uniform, and the regulations established in connection therewith shall make no distinction among different classes of permit holders except with respect to the amount of the fee therefor. Such permit shall not allow the taking of shellfish of a size at a season prohibited by law and the amount therefor taken for any family shall not exceed in any one week, one bushel of any or all kinds of shellfish, but the councilmen or selectmen, as the case may be, may, with the approval of the director, reduce the maximum amount of any or all of such shellfish taken for such purpose. Nothing in this section shall be construed to authorize the aldermen, city council or selectmen to exercise any authority hereunder in areas declared under section seventy-four or under corresponding provisions of

earlier laws to be contaminated unless such action is in accordance with a management plan developed by cities and towns with the assistance and approval of the director.

For purposes of this section and of section fifty-four, the term shellfish shall not include the commercial harvest of those species of shellfish known as sea clams (*spilosa solidissima*) and ocean quahogs (*artica islandica*); provided, however, that the director may authorize the commercial management of sea clams and ocean quahogs by regional management of cities and towns, if in his opinion regional management will be in the best interests of the commonwealth. Regional management shall be based upon a regional plan developed by the cities and towns concerned and approved by the director. The director is authorized to promulgate rules and regulations for the development, approval and implementation of all regional plans.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter** MARINE FISH AND FISHERIES  
**130****Section 53** FORM OF PERMITS; RECORD OF ISSUANCE

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Section 53. All permits issued under section fifty-two shall be issued in the name of the body authorizing the issuing of the same; but, under a vote of such body, any such permit shall be valid if issued bearing the signature of any one member thereof, or of the city or town clerk. A record of the name, residence and address of every person to whom such a permit is issued, with any special details relating to such permit, shall be entered by the officer issuing the same in a book kept in his office for that purpose.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter 130** MARINE FISH AND FISHERIES**Section 54** CULTIVATION, PROPAGATION AND PROTECTION OF SHELLFISH; APPROPRIATIONS BY CITIES AND TOWNS; CLOSE SEASONS

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Section 54. Cities by a vote of the board of aldermen, or city council, and towns by a vote at a town meeting, may appropriate money for the cultivation, propagation and protection of shellfish. The board of aldermen, or city council, or selectmen when so authorized by their town may from time to time declare a close season for any or all kinds of shellfish for not more than three years in such waters, flats or creeks, not then the subject of a private grant, within the limits of their respective cities and towns, as they deem proper, and may plant, grow and protect shellfish in such waters, flats or creeks; provided, that no private rights are impaired; and provided, further, that when any close season, declared as aforesaid, shall have ended, such flats, waters or creeks shall not within two years thereafter be licensed for the private cultivation of shellfish.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter 130** MARINE FISH AND FISHERIES**Section 55** ALIENS; SHELLFISH TAKEN FOR COMMERCIAL PURPOSES;  
PERMITS

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Section 55. No permit for the taking of shellfish for commercial purposes, except in the city of New Bedford, shall be issued by the aldermen or councilmen of any city or the selectmen of any town to an alien unless he has resided in such city or town for at least five years next preceding the date of his application therefor, or has been a resident of the county in which such city or town lies for at least five years next preceding the date of such application and has taken shellfish commercially therefrom for such period.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter 130** MARINE FISH AND FISHERIES**Section 56** JOINT CONTROL BY MUNICIPALITIES OF MARINE FISHERIES

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Section 56. Whenever under the authority of any law two or more municipalities have joint property in, or the right of joint control of, any marine fisheries referred to in section fifty-two, the board of aldermen or city council of the city, or the selectmen of the town if so authorized by the town, in which such fisheries lie may exclusively exercise all the rights, privileges and authority conferred by said section with respect to such fisheries, make appropriations therefor as provided in section fifty-four and exercise such other control, privileges and responsibilities as are granted in other sections of this chapter pertinent thereto, as though such joint control or property did not exist; provided that in the exercise of such rights, privileges, responsibilities and authority such board of aldermen, city council or selectmen shall grant to the citizens of such other municipalities the same rights and privileges as are granted to the citizens of their city or town.

## **Part I** ADMINISTRATION OF THE GOVERNMENT

### **Title XIX** AGRICULTURE AND CONSERVATION

#### **Chapter** MARINE FISH AND FISHERIES **130**

#### **Section 57** SHELLFISH AQUACULTURE LICENSES

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Section 57. The city council or mayor of any city, or the selectmen of any town, may upon written application, accompanied by plans sufficient to show the intended project and project area to be licensed, and after public notice and hearing pursuant to section sixty, grant to any person a shellfish aquaculture license.

Said license shall authorize said licensee in such city or town at all times of the year, in, upon, or from a specific portion of coastal waters of the commonwealth, of tidal flats or land under coastal waters: (1) to plant and grow shellfish, bottom/off bottom culture; (2) to place shellfish in or under protective devices affixed directly to the tidal flats or land under coastal waters, such as boxes, trays, pens, bags, or nets; (3) to harvest and take legal shellfish; (4) to plant cultch for the purpose of catching shellfish seed; and (5) to grow shellfish by means of racks, rafts or floats.

After receipt of a written application by the city council or selectmen, and after the notice and public hearing requirements of this section are satisfied and the licensing authority approves the application, the director

shall, after inspection of the intended project area, certify that issuance of a shellfish aquaculture license and operation thereunder will cause no substantial adverse effect on the shellfish or other natural resources of the city or town. Upon such certification by the director, the city council or selectmen may issue the license, provided, however, that no license shall be issued for any areas then or within two years prior thereto, closed for municipal cultivation under the provisions of section fifty-four. Failure of the director to so certify shall be deemed a denial of the shellfish aquaculture license. The director's certification or refusal to certify shall be reviewable in accordance with section fourteen of chapter thirty A.

Licenses under this section shall be granted or denied in writing within sixty days after receipt of the written application and shall be issued upon forms supplied by such cities and towns and upon such terms and conditions and subject to such terms, conditions or regulations as the city council or selectmen issuing the same shall deem proper, but not so as to impair the private rights of any person or to materially obstruct navigable waters, and said license shall describe by metes and bounds the waters, flats or creeks covered thereby. Shellfish aquaculture licenses pursuant to this section shall be subject to any rules and regulations promulgated by the director, including those concerning the use and scope of predator controls in the intertidal zone, and said licenses may be further conditioned by the director as he deems necessary and appropriate, including species to be propagated and the source and movement of seed shellfish.

Said license shall be for a period of not more than ten years and may be renewed for similar periods. Said license may be revoked by the city council, selectmen or the director for failure to comply with any terms, conditions or regulations set forth by these entities, or for lack of

substantial use of the licensed area. Said licensee shall have the right to the exclusive use of the lands and waters for the purposes of growing shellfish thereon, and the licensee shall plainly mark the boundaries of said area. The selectmen or city council shall permit, as a condition of the license, such public uses of said waters and lands as are compatible with the aquacultural enterprise.

Whoever without the consent of the licensee, unless otherwise permitted by the terms and conditions of said license: (1) takes shellfish from the licensed lands or waters or from said racks, rafts or floats; (2) disturbs the licensed area or the growth of the shellfish thereon in any way; (3) discharges any substance which may directly or indirectly injure the shellfish; (4) willfully injures, defaces, destroys, removes or trespasses upon said racks, rafts, or floats; or (5) willfully injures, defaces, destroys, removes or trespasses upon said protective devices affixed directly to the tidal flats, such as boxes, trays, pens, bags, or nets shall be liable in tort for treble damages and costs to the licensee injured by such act.

Nothing in this section shall be deemed to affect the validity, conditions, or terms of any license granted under the corresponding provisions of earlier laws and in full force upon the effective date of this section.

Nothing in this section shall excuse the licensee from complying with other laws of the commonwealth, including environmental laws and laws concerning interference with navigation.

Said shellfish aquaculture license may be transferred pursuant to section fifty-eight and all rights and privileges enjoyed by the licensee shall be assumed by the transferee.

Any license issued under the provisions of this section shall, upon the death of the licensee, continue in full force and effect, subject to the same terms, conditions, and regulations imposed upon the original license, for the balance of the unexpired term, or one year whichever is longer, for the use of the members of the immediate family of the deceased licensee. For the purposes of this section, immediate family shall mean the spouse, son, daughter, mother, father, brother and sister of said deceased licensee. Nothing in this section shall be deemed to affect the validity, conditions, or term of any license granted under corresponding provisions of earlier laws and in full force upon the effective date of this section.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter** MARINE FISH AND FISHERIES  
**130****Section 58** TRANSFER OR RENEWAL OF LICENSES

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Section 58. Any license granted under section fifty-seven or corresponding provisions of earlier laws may be transferred with the approval of the city council or selectmen to any person to whom it might originally have been granted, and, whether or not so transferred, may, within two years before the expiration of its then current term, be renewed from the expiration of the original term for a further term or terms, each term not to exceed fifteen years. The provisions of this chapter or of corresponding provisions of earlier laws applicable to the original issuance of such license shall, so far as apt, apply to a transfer or a renewal thereof hereunder.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter 130** MARINE FISH AND FISHERIES**Section 59** APPLICATION FOR LICENSE; REQUEST FOR SURVEY AND PLAN

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Section 59. Any person, firm or corporation qualified as provided in section fifty-seven and desiring to obtain a license thereunder shall present to the city council or selectmen a written application setting forth the name and residence of the applicant, a definite description made by reference to a survey conducted by the applicant, and a request that such license be granted to the applicant.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter 130** MARINE FISH AND FISHERIES**Section 60** HEARING ON ISSUANCE OF LICENSE; NOTICE; PUBLICATION

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Section 60. No license referred to in section fifty-seven shall be granted, transferred or renewed until after a public hearing, due notice of which has been posted in three or more public places, and published in a newspaper, if any, published in the city or town where the territory described in the application is situated at least ten days before the time fixed for the hearing, stating the name and residence of the applicant or transferee, as the case may be, the date of the filing of the application for such license, transfer or renewal, and the location, area and description of said territory.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter 130** MARINE FISH AND FISHERIES**Section 61** MARKING OF TERRITORY COVERED BY LICENSE;  
MAINTENANCE OF MARKINGS

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Section 61. The licensee upon receiving his license shall cause the territory covered thereby to be plainly marked out by monuments, marks or ranges and by stakes or buoys, with the number of his license painted in figures at least two inches in height in a conspicuous place on each of said stakes or buoys or on flags attached thereto, which shall be maintained by him or his transferee during the term of the license or of any renewal thereof. Failure to place or reasonably to maintain the same shall be sufficient cause for revocation of the license.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter 130** MARINE FISH AND FISHERIES**Section 62** RECORDS OF LICENSED AREAS, LICENSES GRANTED,  
TRANSFERS AND RENEWALS

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Section 62. The aldermen, city council or selectmen shall keep in their offices plans showing all such licensed areas, and, in a book devoted to that purpose only, a record of each license granted and of all transfers or renewals thereof, which shall include the name and residence of the licensee or transferee, the dates of issue, transfer, renewal and expiration thereof, and a copy of the description of the licensed areas as the same appears in the license. Each license, and all transfers or renewals thereof, shall forthwith after the granting or approval thereof be transmitted by the board so granting or approving the same to the city or town clerk, who shall record the same in a book kept especially therefor in his office. The licensee or transferee shall within thirty days after such issue or approval pay to said clerk for each license or renewal issued or transfer approved one dollar for such recording, and for each license issued shall also pay four dollars as reimbursement of said city or town for the cost incurred in granting said license, a record of which payment shall forthwith be entered upon said record by said clerk, and such license, transfer or renewal shall not take effect until said fees are paid and entry thereof

made as aforesaid. Said records shall be open to public inspection at all reasonable times. Forms for such license and for the transfer or renewal of the same shall be provided by the aldermen, city council or selectmen at the expense of their city or town.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter 130** MARINE FISH AND FISHERIES**Section 63** EXCLUSIVE RIGHTS OF LICENSEES OR TRANSFEREES;  
TRESPASS ON LICENSED AREA; TREBLE DAMAGES

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Section 63. The licensee or transferee, or his legal representatives, shall, for the purposes set forth in section fifty-seven and in accord with the terms set forth in said license, have during the term of the license or of any renewal thereof the exclusive use of the waters, flats or creeks described in the license, and the exclusive right to take all shellfish therefrom during the time therein specified, notwithstanding any regulations made by the aldermen, city council or selectmen of the city or town, subsequent to the issuance of such license or to the renewal thereof, as the case may be; provided, that this section shall not be construed to authorize any taking prohibited by law. The licensee or transferee, or his legal representatives, may in tort recover treble damages of any person who without his or their consent, unless otherwise authorized by law or by lawful regulation so to do, digs or takes shellfish of any kind, or shells, from such waters, flats or creeks, or disturbs the same thereon, during the continuance of the license or of any renewal thereof.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter** MARINE FISH AND FISHERIES  
**130****Section 64** ANNUAL FEE FOR LICENSE

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Section 64. Every such licensee or transferee shall pay to the city or town, on or before a date to be fixed by the aldermen, city council or selectmen, an annual fee of not less than five nor more than twenty-five dollars per acre, or part thereof. If any such fee is not paid within six months after it becomes due the license shall thereupon be forfeited.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter 130** MARINE FISH AND FISHERIES**Section 65** ANNUAL REPORT OF SHELLFISH PLANTED, PRODUCED AND MARKETING; ESTIMATE OF GROWING SHELLFISH; FORFEITURE FOR DEFICIENCY

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Section 65. Every licensee or transferee of a license referred to in section fifty-seven shall submit on oath on or before February 28 in each year to the director and to the city council or selectmen of the city or town wherein the licensed area is situated a report of the total number of each kind of shellfish planted, produced or marketed during the preceding year upon or from such licensed area, and an estimate of the total number of each kind of shellfish at the time of such report planted or growing thereon. The city council or selectmen may specify a reasonable yearly market value to be produced by each shellfish project licensed pursuant to section fifty-seven. Failure of the licensed shellfish project to meet such a value for any three consecutive years thereafter may result in a forfeit of the shellfish aquaculture license and licensed area.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter 130** MARINE FISH AND FISHERIES**Section 66** DESTRUCTION OR REMOVAL OF MARKS OR BOUNDS;  
DOUBLE DAMAGES

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Section 66. No person shall willfully injure, deface, destroy or remove any mark or bound used to define the extent of any shellfish license or grant, or place any unauthorized mark thereon, or tie or fasten any boat or vessel thereto. Any person who violates this section shall be liable in tort for double damages and costs to the licensee or transferee injured by the violation.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter 130** MARINE FISH AND FISHERIES**Section 67** TAKING OR DISTURBING SHELLFISH FROM LICENSED  
GROUNDS OR BEDS WITHOUT CONSENT

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Section 67. No person shall, without the consent of the licensee or transferee, as the case may be: (i) work a dredge, oyster tongs, rake or other implement for the taking of shellfish of any description upon any shellfish grounds or beds covered by a license granted under section 57 or any corresponding provision of earlier law; (ii) in any way, disturb the growth of the shellfish thereon; (iii) discharge any substance which may directly or indirectly injure the shellfish upon any such grounds or beds; or (iv) while upon or sailing over any such grounds or beds, cast, haul, or have overboard any such dredge, tongs, rake or other implement for the taking of shellfish of any description, under any pretense or for any purpose.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter 130** MARINE FISH AND FISHERIES**Section 68** DIGGING, TAKING OR CARRYING AWAY SHELLFISH FROM  
LICENSED WATERS, FLATS OR CREEKS AT NIGHT

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Section 68. No person shall dig, take or carry away any shellfish or shells between one half hour after sunset and one half hour before sunrise, by any method whatever, from any waters, flats or creeks as to which a license under section fifty-seven or corresponding provisions of earlier laws is outstanding. A licensee or transferee of such a license violating this section shall, in addition to all other penalties provided, forfeit his license and the shellfish remaining on the licensed premises.

No person shall, without the consent of the licensee or transferee, dig or take any shellfish or shells from any waters, flats or creeks described in a license granted under section 57 or any corresponding provision of earlier law, during the continuance of the license or of a renewal thereof.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter 130** MARINE FISH AND FISHERIES**Section 69** SEED QUAHAUGS, CLAMS OR OYSTERS; TAKING OR POSSESSION

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Section 69. Whoever takes or has in his possession quahaugs or soft shelled clams or oysters smaller than the minimum size established by the director through regulations, hereinafter referred to as seed quahaugs, seed clams and seed oysters, to the amount of more than five percent of any batch, shall be punished in accordance with section two; provided, however, that it shall not be unlawful to take seed quahaugs, seed clams or seed oysters or have the same in possession under authority of a permit therefor, which the director is hereby authorized to grant, for a replanting in waters or flats within the commonwealth.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter 130** MARINE FISH AND FISHERIES**Section 70** TAKING AND SALE OF SCALLOPS; ADULT AND SEED SCALLOPS; CULLING

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Section 70. No person shall take from the flats or coastal waters of the commonwealth scallops other than adult scallops, or sell or offer for sale or have in possession such scallops. For the purposes of this section an adult scallop shall be a scallop with a well-defined raised annual growth line, and any scallop without such line shall be deemed a "seed" scallop. Scallops taken from the coastal waters shall immediately be culled when taken, and all scallops other than adult scallops shall forthwith be returned alive to the coastal waters whence taken; but it shall not be unlawful to sell or have in possession scallops other than adult scallops unavoidably left in the catch after it has been culled, to the amount of not more than five per cent of the total catch remaining. All scallops taken in accordance with this section shall be taken ashore in the shell. This and section seventy-one shall not apply to seed and adult scallops carried by storm or tide from the natural beds and deposited on beaches and flats where, in the opinion of the director, they cannot survive, but the taking of said seed scallops and the taking and sale of said adult scallops may be authorized by him at any season of the year. The director shall

promulgate rules and regulations governing the taking and sale of said seed and adult scallops by special permits, which he is empowered to issue without fee, or otherwise so as to prevent the sale of seed scallops at any time, or the sale of adult scallops between April first and the following October first, except as authorized herein.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter** MARINE FISH AND FISHERIES  
**130****Section 71** CLOSE SEASON ON SCALLOPS

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Section 71. Except as provided in sections seventy and seventy-three, no person shall take scallops between April first and the following October first from the flats or coastal waters of the commonwealth, or buy or sell or have in possession scallops so taken.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter** MARINE FISH AND FISHERIES  
**130****Section 72** LIMITATION ON CATCH OF SCALLOPS

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Section 72. No person shall for any purpose take more than a total of ten bushels of scallops, including shells, in one day, unless authorized by the director under sections seventy and seventy-three so to do.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter 130** MARINE FISH AND FISHERIES**Section 73** GRANTING MODIFICATION IN RESPECT TO CLOSE SEASON  
AND NUMBER OF SCALLOPS THAT MAY BE TAKEN;  
PETITION; INVESTIGATION

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Section 73. The provisions of sections seventy-one and seventy-two in respect to the open and close season, and in respect to the number of scallops that may be taken, may be temporarily modified if, on petition of the aldermen, city council or selectmen to the director, the director after investigation, determines that, owing to unusual circumstances, such modification is expedient. In that case, he may authorize, for a prescribed period, the aldermen, city council or selectmen to issue permits to inhabitants of their respective cities or towns to take scallops in such quantities and at such times as he deems expedient.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter 130** MARINE FISH AND FISHERIES**Section 74** DETERMINATION OF CONTAMINATED AREAS; NOTICE OF RESULTS

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Section 74. The division of marine fisheries shall examine from time to time as conditions may require, or upon request of the commissioner of public health, the mayor or city manager of a city, or the selectmen or town manager of a town, the coastal waters and flats of the commonwealth and samples of shellfish therein or thereon in order to determine what areas thereof are so contaminated that shellfish obtained therefrom are unfit for food and dangerous to the public health. The division of marine fisheries shall forward the results of all tests as directed by the commissioner of public health. If, after such examination, either the department of public health or the division of marine fisheries determines that such contamination exists, it shall, by written order, promulgate definite bounds of the area or areas so determined to be contaminated, and may specify the period of time during which such determination shall be in effect. Before such determination shall be in effect, such department or division making the determination shall:

- (1) Publish the results of its determination thereof in a newspaper published in each city and town in which or adjacent to which any contaminated area is situated.
- (2) File in the office of the clerk of every such city or town the results of the determination.
- (3) Cause to be posted at points on or near every such area a description thereof, specifying said bounds and a statement that such an area is contaminated.
- (4) If the department of public health makes the determination, notify the directors of the division of marine fisheries and the division of law enforcement of its determination by filing with them properly authenticated copies, certified by the secretary of state, of its determination, publication, filing and posting.
- (5) If the division of marine fisheries makes the determination, notify the director of the division of law enforcement of its determination by filing with him properly authenticated copies, certified by the secretary of state, of its determination, publication, filing and posting.

Whenever, as a result of a subsequent examination of an area or areas determined by the division of marine fisheries or the department of public health to be contaminated, such division or said department, as the case may be, determines that the shellfish in such area or areas are safe to use as food, notice of such determination shall be published immediately, and provided to the directors of the division of marine fisheries and the division of law enforcement, in the case of a determination by the department of public health, and to the director of the division of law enforcement in the case of a determination by the division of marine fisheries; provided, however, that if the department of public health or the

division of marine fisheries has specified a period of time during which the determination of pollution shall be in effect, such publication and notice shall not be required if such period has expired. The record of any examination hereunder and the bacteriological counts made therein shall be subject to inspection upon request.

Personnel at the department of public health and the division of marine fisheries in the performance of their duties under this section, may enter upon and pass through or over private lands or property whether or not covered by water.

The presentation in evidence by any officer of the commonwealth empowered to enforce this chapter of a document attested to by the commissioner of the department of public health or the director of the division of marine fisheries or either of their designees to the effect that the provisions of this section have been complied with shall be prima facie evidence that an effective determination has been made.

The department of public health and the division of marine fisheries, acting jointly, after consultation with the department of environmental protection, 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.

This section shall not apply to scallops or conch unless scallops or conch are specifically included in such determination.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter 130** MARINE FISH AND FISHERIES**Section 74A** EMERGENCY DESIGNATION OF CONTAMINATED SHELLFISH AREAS; ENFORCEMENT; NOTICE TO LOCAL AUTHORITIES

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Section 74A. Both the department of public health and the division of marine fisheries shall have the authority immediately to designate shellfish areas as contaminated and that shellfish obtained therefrom are unfit for food and dangerous to the public health, in the event of an emergency as determined by either the department of public health or the division of marine fisheries. Such designation shall be reported to the division of law enforcement, and, in the case of a determination by the department of public health, to the division of marine fisheries, who shall take the necessary action to prevent the taking of shellfish from such area for human consumption and so notify local authorities in each instance. Such determination shall be in effect until subsequent examination, initiated not more than thirty days after the emergency has been determined, shows the shellfish from such area to be safe for human consumption and the said department or division which designated the emergency declares it to be over. In the event that the department of public health determines that there is an emergency, the commissioner of

public health shall have the power to direct the activities of all employees of the division of marine fisheries who are regularly engaged in monitoring the condition of shellfish during that emergency.

This section shall not apply to scallops or conch unless scallops or conch are specifically included in such determination.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter 130** MARINE FISH AND FISHERIES**Section 75** SHELLFISH FROM CONTAMINATED AREAS, PERMITS,  
PURIFICATION; SHELLFISH CONSERVATION

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Section 75. The director may grant, and may revoke, written permits for the digging or taking of shellfish from an area determined under section seventy-four or corresponding provisions of earlier laws to be contaminated while such determination is in force, every such permit to be upon the express condition, which shall be set forth therein, that all shellfish dug or taken from the area or areas covered by such permit by the holder thereof shall, before being used or disposed of for consumption as food, be purified at a plant, or by a method, approved in writing by the commissioner of public health and upon such further conditions and regulations as will, in the opinion of the director, most effectively prevent the use of said shellfish as food until so purified. For the purpose of this paragraph the director, upon receipt of the proper fees, may issue the following classes of permits:—a master digger's permit for an individual who digs or takes shellfish from such areas for such purification; a digger's permit for an individual who digs shellfish for the holder of a master digger's permit; and a bait permit for an individual who digs and takes shellfish from such areas for bait purposes only;

provided, that no person shall be eligible for a bait permit hereunder who has a digger's permit or who sells shellfish for food purposes. In order to assure full compliance with said conditions and regulations, the director shall require a bond to be obtained by a master digger in a sum not to exceed one thousand dollars for a master digger whose record includes no prior judicial or administrative convictions related to this chapter; not to exceed twenty-five hundred dollars for a master digger whose record includes one prior judicial or administrative conviction, related to this chapter; and, not to exceed five thousand dollars for a master digger whose record includes two or more prior judicial or administrative convictions related to this chapter. The director may require forfeiture of all or part of such bond for any violation of said conditions and regulations. Any city or town may develop a shellfish conservation and management plan containing such information as the director may require and shall submit said plan to the director for his approval. Any city or town having a plan approved by the director may require permits for the taking of shellfish from areas determined under section seventy-four to be contaminated, provided that all other permits and licenses required by law are obtained. Fees shall be reasonable and commensurate with the services provided by the city or town. If at any time the director finds any city or town in violation of any provision of its approved shellfish conservation and management plan he may forthwith withdraw his approval of such plan. No city or town permit shall be required by any master digger or subordinate on any mildly contaminated area where the director has withdrawn his approval of that city or town's shellfish conservation and management plan as provided herein until such plan is deemed approved by the director. In evaluating the plan for approval, the

director shall take into consideration the city or town's efforts to fairly administer the distribution of, and fees for, local permits to be issued to residents and nonresidents.

Whoever, without a permit as provided in this section or contrary to such permit, digs or takes shellfish for any purpose from any area determined under section 74 or section 74A or under any corresponding provision of earlier law to be contaminated, while such determination is in force, and whoever knowingly transports or causes to be transported or has in their possession or offers for sale shellfish so dug or taken shall be punished by imprisonment in a jail or house of correction for not more than 2 1/2 years or by imprisonment in the state prison for not more than 3 years, by a fine of not less than \$500 and not more than \$10,000 or by both such fine and imprisonment. The superior court shall have jurisdiction in equity to enforce this section and the rules and regulations of the director made hereunder and to restrain the violation thereof. In any prosecution for a violation of this section, the possession by a digger, licensed wholesaler or retail dealer, but not by a common carrier, of shellfish taken in apparent violation of this section shall be prima facie evidence of a violation thereof.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter 130** MARINE FISH AND FISHERIES**Section 76** CONSTRUCTION AND OPERATION OF SHELLFISH  
PURIFICATION PLANTS; POWERS OF COMMISSIONER

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Section 76. The director of the division of marine fisheries may construct and operate shellfish purification plants for the treatment of shellfish taken from areas determined under section seventy-four or any corresponding provisions of earlier laws, to be contaminated, and may operate such existing purification plants to serve such areas as he may deem necessary for these purposes. Said director may acquire by purchase, gift, lease or otherwise, or take by eminent domain under chapter seventy-nine, such land and buildings thereon as may be necessary for the purposes of this section. Said director or his designee shall have sole authority over the acceptance, treatment and discharge of shellfish at such plants, subject to the rules and regulations, which the department of public health is hereby authorized and directed to adopt, relative to the protection of the public health in the consumption of such shellfish.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter** MARINE FISH AND FISHERIES  
**130****Section 77** COST OF OPERATION

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Section 77. For the purpose of partially defraying the costs of the operation and maintenance of shellfish purification plants, the division of marine fisheries shall charge the users of said service an amount which shall be determined annually by the commissioner of administration under the provision of section three B of chapter seven.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter 130** MARINE FISH AND FISHERIES**Section 80** COMMERCIAL PERMITS AND CERTIFICATES; ISSUANCE; TRANSFERS; WHOLESALE DEALER PERMIT; REGULATED MARINE FISHERY PERMIT; RULES AND REGULATIONS; CANCELLATION; REVOCATION; PENALTIES

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Section 80. Except as permitted in sections thirty-eight and seventy-five, no person shall fish for or take fish for commercial purposes in the coastal waters, or land raw fish, whether frozen or unfrozen, in the commonwealth, for the purpose of sale unless he is the holder of a commercial fisherman permit. A commercial fisherman permit may be issued to an individual or it may be issued in the name or number of a vessel, in which case it shall be valid for all persons on board said vessel. A vessel permit may be transferred upon application to the director. Notwithstanding any contrary provisions contained in this section and except as provided in section seventy-five, a person shall not dig or take shellfish or marine worms for commercial purposes unless he is the holder of a commercial fisherman permit (shellfish) or unless he is the holder of a commercial fisherman permit which has been specially endorsed, at no additional charge, for the taking of such shellfish or marine worms; a person holding a permit issued under section seventy-

five shall not hold a permit issued under this section for the taking or digging of shellfish or marine worms. Notwithstanding any contrary provision contained in this section, a person who has in his possession a commercial fisherman permit for rod and reel may take by rod and reel or by diving and sell fin fish lawfully taken from the coastal waters.

A person shall not for commercial purposes acquire, handle, store, distribute, process, fillet, ship or sell raw fish, whether frozen or unfrozen in bulk or for resale, without first obtaining a wholesale dealer permit issued jointly by the division of marine fisheries and the department of public health; provided, however, that the holder of a valid commercial fisherman permit who catches fish or takes lobsters and sells such fish or lobsters to wholesale or retail dealers exclusively shall be exempt from obtaining a wholesale dealer permit; and provided, further, that the holder of a wholesale dealer permit shall not procure raw fish, whether frozen or unfrozen, from any person who does not hold a valid commercial fisherman permit. A person shall not sell raw fish at retail, whether frozen or unfrozen without first obtaining a retail dealer permit issued jointly by the division of marine fisheries and the department of public health; provided, however, that the holder of a valid wholesale dealer permit may sell fish at retail at one location which shall be named on the permit; and provided, further, that the holder of a retail dealer permit shall not procure raw fish, whether frozen or unfrozen, from any person who does not hold a valid commercial fisherman permit or a valid wholesale dealer permit. Upon application to the director and endorsement on the permit the holder of a retail dealer permit may take bait, except as provided in section seventy-eight, for sale under said permit.

A person shall not for commercial purposes shuck shellfish, or pack or repack shucked shellfish, or dig, take, pack or buy shellfish within this commonwealth for shipment outside the commonwealth, without the approval of the director which shall be endorsed on the certificate or permit held by such person at no additional cost.

No person shall take or sell fish from a fishery regulated by the director without a regulated marine fishery permit, in addition to any other permit that may be required by this chapter.

The director shall promulgate rules and regulations relative to the form, contents, and use of all permits issued under this chapter except the form, contents and use of wholesale and retail seafood dealer permits which shall be subject to rules and regulations promulgated by the director and the commissioner of public health. The director shall revoke and cancel and require the surrender of any permit issued under this chapter if, in his opinion, after a hearing, after due notice by him or some person designated by him, the holder has violated any rule or regulation of the director or of any provision of this section or section seventy-five, or upon a change in the facts and conditions set forth in such permit or certificate. The commissioner of public health shall also have the authority to revoke and cancel and require the surrender of any wholesale dealer or retail dealer permit issued under this chapter if, in his opinion, after a hearing, after due notice by him or some person designated by him, the holder has violated any rule or regulation of the department of public health or any general or specific law pertaining to fish or the sale thereof, or upon a change in the facts and conditions set forth in such permit. Pending the hearing, the certificate may be suspended. Whoever

violates any provision of this section shall be punished by a fine of not less than \$400 and not more than \$10,000 or by imprisonment for not more than three years, or both.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter 130** MARINE FISH AND FISHERIES**Section 81** IMPORTATION OF SHELLFISH FOR CONSUMPTION;  
CERTIFICATION; LABELING OF CONTAINERS

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Section 81. No person shall transport, or cause to be transported, into this commonwealth for consumption as food any shellfish taken or dug from areas outside the commonwealth, or sell, cause to be sold, or keep, offer or expose for sale for consumption as aforesaid any shellfish so taken or dug, unless such person has been certified by the regulatory authority in the United States or foreign country under the uniform sanitation requirements of the cooperative program for the certification of interstate shellfish shippers, nor shall any person transport or cause to be transported within this commonwealth any shellfish for consumption as food, unless the container of such shellfish shall, at all times while in such transportation, bear a label or tag legibly marked with the name and address of the producer and of the shipper thereof and the numbers of such certificates, and the name of the place where and the date when taken, nor shall any person counterfeit, alter, deface or tamper with any label or tag, and absence of such label or tag so marked or failure to

allow an inspection shall be prima facie evidence of violation of this section; provided, that the foregoing provisions relative to transportation shall not apply to common carriers, their servants or agents.

Whoever violates any provision of this section shall be punished by a fine of not less than \$400 and not more than \$10,000 or by imprisonment for not more than three years, or both. The provisions of this section shall be enforced by the department of public health, local boards of health, the director and all officers qualified to serve criminal process; provided, that the provisions of this section and of section eighty-two shall not apply to shellfish taken from an area declared to be contaminated under the provisions of section seventy-four or corresponding provisions of earlier laws.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter 130** MARINE FISH AND FISHERIES**Section 82** SOURCE OF SUPPLY OF SHELLFISH; TAGS OR LABELS;  
CONTENTS; RECORD OF MARKINGS ON TAGS OR LABELS;  
INSPECTION

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Section 82. No wholesale or retail dealer in shellfish, and no person holding a victualler's license, shall receive any shellfish unless the same bears a label or tag legibly marked with the source of supply, the date when taken, and either the certificate or permit number or the name and address of the producer or shipper, and all shellfish in transit shall bear such label or tag so marked. If such shellfish have been processed at a shellfish purification plant operated under the provisions of section seventy-six, the label or tag shall be so marked, and shall contain such other information as the director may by rule or regulation require. He shall for sixty days after receipt of such shellfish keep in his place of business a record of the markings on such tag or label, which record shall at all reasonable times be open to inspection by any representative of the division or of the department of public health. Whoever violates any provision of this section or fails or neglects to furnish the required label or tag or furnishes such a label or tag bearing false or misleading

information or counterfeits, alters, defaces, or tampers with any label or tag shall be punished by a fine of not less than \$400 and not more than \$10,000 or by imprisonment for not more than three years, or both.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter 130** MARINE FISH AND FISHERIES**Section 92** SALE OF SCALLOPS; SOAKED SCALLOPS; SCALLOPS NOT IN SHELL; MARKING OF CONTAINERS; COMMON CARRIERS

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Section 92. No person shall sell, exchange, transport or deliver and no person shall offer or expose for sale, exchange or delivery or have in their custody or possession with intent to sell, exchange, transport or deliver any scallops or sea scallops which have been soaked and shall tag such scallops in accordance with regulations promulgated by the director.

This section shall not apply to common carriers having scallops in possession for the purpose of transportation.

**Part I** ADMINISTRATION OF THE GOVERNMENT**Title XIX** AGRICULTURE AND CONSERVATION**Chapter 130** MARINE FISH AND FISHERIES**Section 98** SHELLFISH CONSTABLES; APPOINTMENT; POWERS AND DUTIES; NOTICE OF APPOINTMENT

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Section 98. In each city and town bordering on coastal waters the mayor or the selectmen, as the case may be, shall appoint a person or persons, qualified by training and experience in the field of shellfishery management, as shellfish constables or deputy shellfish constables. A person having successfully completed the shellfish wardens training course at the Massachusetts Maritime Academy as certified by said academy, shall be considered qualified by training and experience in the field of shellfishery management and shall be eligible for appointment as a shellfish constable or deputy shellfish constable. Such shellfish constables and deputy shellfish constables shall be appointed for terms of three years, and may be reappointed. They shall, subject to the appointing authority, initiate, promote and manage shellfisheries in such city or town and shall make or cause to be made such studies as may be necessary to enhance the value of such shellfisheries. They shall enforce all statutes, ordinances, by-laws, rules and regulations relative to shellfish in such city or town. They shall, for the enforcement of sections thirty-one, thirty-seven, forty-one, forty-three and forty-four, have the authority

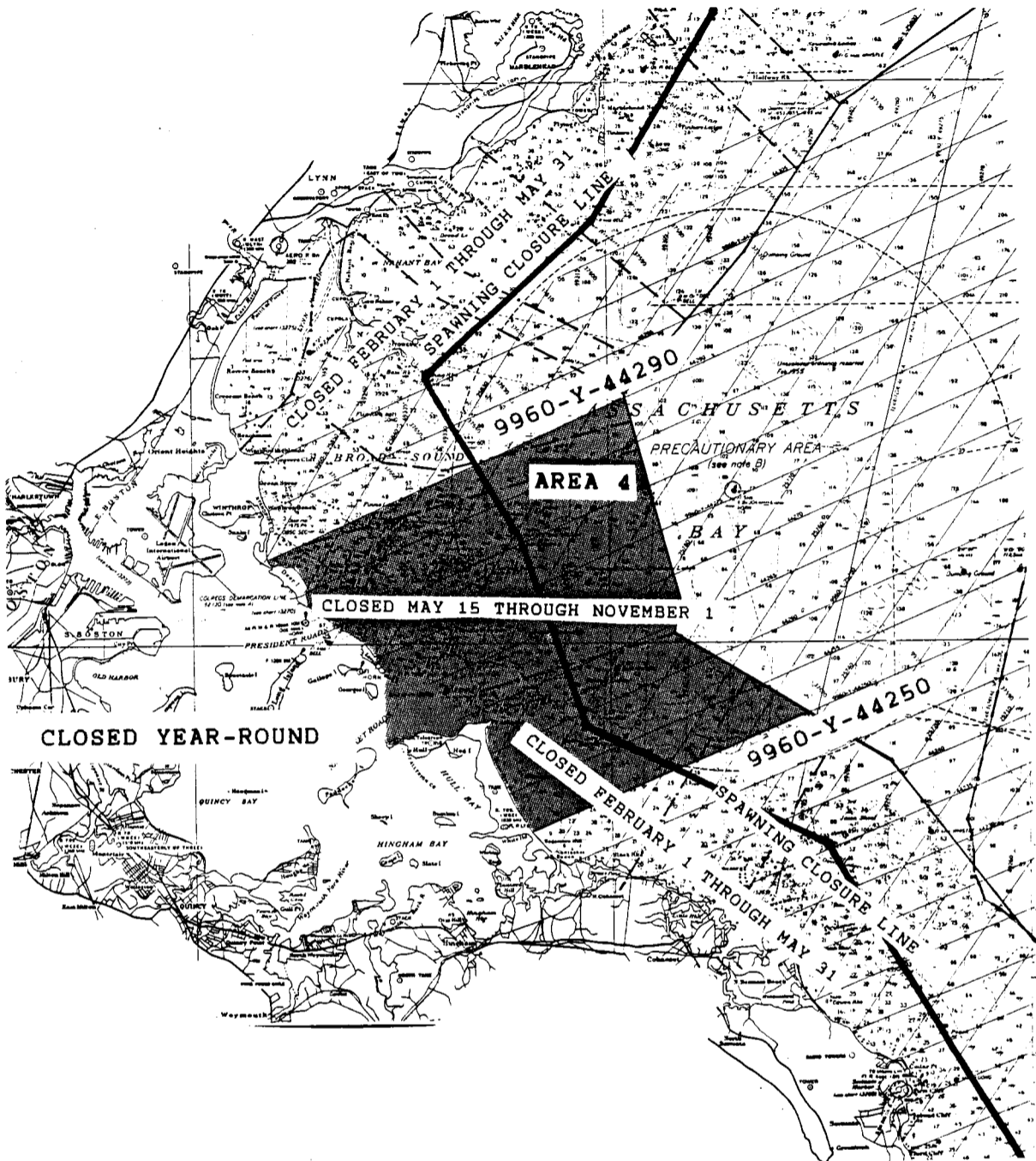
granted to natural resource officers, subject to written rules and regulations of the commissioner. In the performance of his duties, a shellfish constable or deputy shellfish constable may request any person who he has cause to believe is engaged in unlawful shellfishing, is in unlawful possession of shellfish, or is in possession of shellfish unlawfully taken, to display forthwith for inspection all shellfish in his possession, and he may arrest without a warrant any person refusing or failing to comply with such request.

Upon the appointment of a shellfish constable or deputy shellfish constable under this section, the appointing authority shall forthwith notify the director of the division of marine fisheries and the director of the division of law enforcement.

322 CMR: DIVISION OF MARINE FISHERIES

4.04: continued

Chart 322 CMR 4.04(4)(b)



4.05: Further Regulation of Fishing Gear (Reserved)

4.06: Use of Mobile Gear

(1) Definitions. For purposes of 322 CMR 4.06 the following terms shall have the following meanings:

4.06: continued

Coastal Access Permit (CAP) means the regulated fishery permit endorsement for certain mobile gear, issued pursuant to M.G.L. c. 130, § 80, and 322 CMR 7.01(4)(a): *Regulated Fishery* and 7.05: *Coastal Access Permit (CAP)*.

Cod End means all parts of a net a distance of 50 continuous meshes forward of the terminal portion of the net where fish are retained.

Director means the Director of the Division of Marine Fisheries.

Division means the Division of Marine Fisheries.

Dredge means mobile fishing gear consisting of a mouth frame attached to a holding bag constructed of metal rings, mesh or cages.

Effective Fishing Width means the distance measured between the extreme outside edges of the mouth of a dredge or dredges.

Fishing or Fish For means to harvest, catch or take or attempt to harvest, catch or take any fish or shellfish for commercial purposes. A vessel is presumed to be fishing if its dredge, trawl or seine gear remains in the water or is not on board and secured to the vessel's sides or sterns.

Ghost Gear means any fixed fishing gear including, but not limited to, gillnets and traps with their associated ropes which are no longer buoyed to the surface of the water, are not visible from the surface and become entangled with mobile gear.

Hauling Back means retrieving any dredge, trawl or seine and placing the contents of the catch on the deck or hold of the vessel.

Mobile Gear means any moveable or encircling fishing gear or nets which are towed, hauled or dragged through the water for the harvest of fish including, but not limited to, pair trawls, otter trawls, beam trawls, mid water trawls, scottish seines, danish seines, pair seines, purse seines or shellfish dredges.

Molted Lobster means any newly molted lobster whose carapace has not hardened and may be dented by exerting lateral pressure with the fingertips.

Night Fishing means fishing ½ hour after sunset to ½ hour before sunrise during the period of March 1<sup>st</sup> through October 31<sup>st</sup>, or from 6:00 P.M. to 6:00 A.M. during the period of November 1<sup>st</sup> through the last day of February.

NOAA Chart means the official and reproduced nautical charts of the National Oceanic and Atmospheric Administration, United States Department of Commerce.

Person means any individual, including the captain, master or crew member of a fishing vessel, or any firm, partnership, corporation or other business entity.

Seine means a net with long narrow wings that is rigged with floats and weights that is moved through the water to catch fish or any floated or weighted net that is used to encircle fish and is closed by means of a drawstring through threaded rings attached to the bottom of the net.

## 4.06: continued

Small Mesh Squid Trawl Exempted Area means that area within the waters under the jurisdiction of the Commonwealth beginning where 42° 40' north latitude intersects with the eastern shoreline of Chatham; thence in a straight line due east to where it intersects with the three nautical mile line, as described on NOAA Chart #13646; thence following the three nautical mile line, as described on NOAA Charts #13246 and #13237 in a southerly direction to where it intersects with 70° 00' west longitude; thence due south along the 70° meridian to where it intersects again with the three nautical mile line, as described on NOAA Chart #13237; thence following the three nautical mile line, as described on NOAA Charts #13237 and #13218 in a southerly then westerly direction to the MA/RI seaward marine boundary; thence following the MA/RI seaward marine boundary in a northerly direction to the shoreline; thence following the shoreline in an easterly direction to the starting point. This shall exclude all applicable inshore net areas defined at 322 CMR 4.02.

Small Mesh Trawl means any trawl with net mesh openings that are less than 6½ inch in the cod end and six inches throughout the remainder of the net.

Southern Shoreline of the Elizabeth Islands means the area circumscribed by an imaginary line beginning at the shortest straight line between Cuttyhunk Island and Nashawena Island; the shortest straight line between the easternmost point of Nashawena Island and the southwesternmost point of Pasque Island; the shortest straight line between Pasque Island and Naushon Island; the shortest straight line between Jobs Neck on the eastern side of Naushon Island to the southernmost point on Nonamesset Island; the shortest straight line from Mink's Point on the northernmost point of Nonamesset Island to the western entrance of Little Harbor in Woods Hole.

Three Mile Line means that line as it appears on NOAA charts demarcating waters that are three nautical miles from the coastline.

Top of the Trawl Net means the 50% of the trawl net that would not be in contact with the ocean bottom during a tow if the trawl net were laid flat on the ocean floor. It shall not include head ropes attached to the net.

Trawl means any mobile fishing gear or nets which are towed, hauled, or dragged through the water for the harvest of fish including, but not limited to, otter trawls, beam trawls, and pair trawls.

Twine Top means the net material or other material on the top of a scallop dredge.

Upper Cape Cod Whiting Area means that area within the waters under the jurisdiction of the Commonwealth encompassed by an imaginary straight line that begins 42° 7.85' north latitude and 70° 30.1' west longitude; thence in a south southeasterly direction to where it intersects with 42° 00' north latitude and 70° 24.076' west longitude; thence due east to where it intersects with 42° 00' north latitude and 70° 13.225 west longitude; thence in a north northwesterly direction to where it intersects with 42° 4.75' north latitude and 70° 16.95' west longitude; thence in an east northeasterly direction to where it intersects with 42° 8.35' north latitude and the 70° west longitude; thence in a northwesterly direction to 42° 14.05' north latitude and 70° 8.8' west longitude; thence in a west southwesterly direction to the initial coordinate.

Vessel means any commercial fishing vessel registered under the laws of the state and conducting commercial fishing operations within waters under the jurisdiction of the Commonwealth.

(2) Seasonal Mobile Gear Closures. The following closures shall apply to the use of mobile gear within the waters under the jurisdiction of the Commonwealth.

## 4.06: continued

(a) Area 1 - North Shore Region - Year Round Closure. Except as provided at 322 CMR 4.06(2)(a)1. and 4.06(2)(k), it shall be unlawful to fish with mobile gear within the waters of the North Shore Region Year Round Closure. North Shore Region Year Round Closure consists of those waters under the jurisdiction of the Commonwealth encompassed by an imaginary line beginning where 41° 21.552' north latitude with the eastern shoreline of Deer Island in Winthrop; thence in a straight line in an east northeasterly direction to where it intersects with 42° 24.497' north latitude and 70° 49.232' west longitude; thence in a straight line in a northeasterly direction to where it intersects with 42° 27.018 north latitude and -70° 46.446' west longitude; thence continuing in a straight line in a northeasterly direction to where it intersects with 42° 29.664' north latitude and 70° 43.914' west longitude; thence in a straight line in a northeasterly direction to where it intersects with 42° 31.688' north latitude and 70° 40.164' west longitude; thence in a straight line in a easterly direction to where it intersects with 42° 31.836' north latitude and 70° 38.118' west longitude; thence in a straight line in an east northeasterly direction to 42° 32.502' north latitude and 70° 36.432 west longitude; thence in a straight line in a northeasterly direction to the nearest point where it intersects with the three nautical mile line, as described on NOAA Chart #13267, at the 70° 36.162' west longitude; thence following the three nautical mile line, as described on the NOAA Charts #13267 and 13278, to the seaward junction of the Massachusetts - New Hampshire marine boundary; thence shoreward along the Massachusetts - New Hampshire marine boundary to the shoreline; and thence in a southerly direction along the shoreline and concluding at the starting point.

1. North Shore Mobile Gear Seasonal Area Exemptions. Coastal Access Permit holders further endorsed for North Shore Mobile Gear may fish within the North Shore Region Year Round Closure Area in accordance with the following exemptions:

a. Area 1A Gloucester/Rockport Exemption. During the periods of February 1<sup>st</sup> through March 31<sup>st</sup> and June 15<sup>th</sup> through September 30<sup>th</sup>, mobile gear may be fished within those waters under the jurisdiction of the Commonwealth encompassed by an imaginary line beginning off the northernmost Gloucester-Rockport coastline where 70° 37.365' west longitude intersects with the three nautical mile line, as described on NOAA Chart #13278; thence following in a straight line in a south southwesterly direction to where it intersects 42° 42.848' north latitude and 70° 37.632' west longitude; thence in a straight line in a southeasterly direction to where it intersects with 42° 40.806' north latitude and 70° 33.468' west longitude; thence in a straight line in a south southeasterly direction to where it intersects with 42° 39.504' north latitude and 70° 32.776' west longitude; thence in a straight line due south to where it intersects with 42° 37.806' north latitude and 70° 32.776 west longitude; thence in a straight line in a south southwesterly direction to where it intersects with 42° 35.490' north latitude and 70° 34.578' west longitude; thence in a straight line in a south easterly direction to the nearest point where it intersects with 70° 33.770' west longitude at the three nautical mile line, as described on NOAA Chart #13278; thence following the three nautical mile line, as described on NOAA Chart #13278, in a northerly direction concluding at the starting point.

b. Area 1B Ipswich Bay Exemption. During the period December 15<sup>th</sup> through April 30<sup>th</sup>, mobile gear may be fished within those waters under the jurisdiction of the Commonwealth encompassed by an imaginary line beginning at the intersection of 70° 47.838' west longitude with the Massachusetts - New Hampshire marine boundary; thence following the Massachusetts - New Hampshire marine boundary seaward in an easterly direction to where it intersects with the three nautical mile line, as described on NOAA Chart #13278; thence following the three nautical mile line, as described on NOAA Chart #13278, in a southerly direction to the northern Gloucester-Rockport coastline to where it intersects with 70° 37.365' west longitude; thence in a straight line in a south southwesterly direction to where it intersects with 42° 42.222' north latitude and 70° 38.130' west longitude; and thence following one nautical mile seaward from shore in a northerly direction concluding at the starting point.

c. Restrictions on the Use of Trawl Gear during Area 1A and Area 1B Seasonal Exemptions. It shall be unlawful for any fishermen fishing with mobile gear during the Area 1A and 1B seasonal exemptions:

## 4.06: continued

- i. To fish trawl nets configured with a sweep or a foot rope greater than 80 feet.
- ii. To fish trawl nets configured with a sweep or foot ropes composed of chain, wire or discs.
- iii. To fish with roller gear.
- iv. To possess or retain any lobsters. Any lobsters caught shall be immediately returned to the sea.

(b) Area 2 Closure - Boston Harbor - April 1<sup>st</sup> through December 31<sup>st</sup>. Except as provided at 322 CMR 4.06(2)(k), it shall be unlawful to fish with mobile gear from April 1<sup>st</sup> through December 31<sup>st</sup> within the waters of the Area 2 Closure. The Area 2 Closure consists of those waters under the jurisdiction of the Commonwealth encompassed by an imaginary line beginning where 42° 21.552' north latitude intersects with the eastern shoreline of Deer Island in Winthrop; thence in a straight line in an east northeasterly direction to where it intersects with 42° 24.497' north latitude and 70° 49.232' west longitude; thence in a straight line in a southwesterly direction to where it intersects with 42° 24.432' north latitude and 70° 49.302' west longitude; thence in a straight line in a south southeasterly direction to where it intersects with 42° 20.748' north latitude and 70° 48.000' west longitude; thence in a straight line in a southerly direction to where it intersects with 42° 20.100' north latitude and 70° 48.114' west longitude; thence in a straight line in an east southeasterly direction to where it intersects with 42° 18.762' north latitude and 70° 45.222' west longitude; thence in a straight line in a west southwesterly direction to where 42° 16.646' north latitude intersects with the eastern shoreline of Nantasket Beach in Hull; and thence following the shoreline of Hull in a north and westerly direction along the shoreline concluding at the starting point.

(c) Area 3 - Hull to Plymouth - May 1<sup>st</sup> through October 31<sup>st</sup>. Except as provided at 322 CMR 4.06(2)(k), it shall be unlawful to fish with mobile gear from May 1<sup>st</sup> through October 31<sup>st</sup> within the waters of the Area 3 Closure. The Area 3 Closure consists of those waters under the jurisdiction of the Commonwealth beginning where 42° 16.646' north latitude intersects with the eastern shoreline of Nantasket Beach in Hull; thence in a straight line in an east northeasterly direction to where it intersects with 42° 18.762' north latitude and 70° 45.222' west longitude; thence in a straight line in an east southeasterly direction to where it intersects with 42° 17.664' north latitude and 70° 42.684' west longitude; thence in a straight line in a southeasterly direction to the nearest point where it intersects with the three nautical mile line, as described on NOAA Chart #13267, at 70° 40.986' west longitude; thence following the three nautical mile line, as described on NOAA Chart #13267, in a southeasterly direction to where it intersects with 70° 35.367' west longitude; thence in a straight line in a south southeasterly direction to where it intersects with 42° 6.948' north latitude and 70° 34.548' west longitude; thence in a straight line in a south southeasterly direction to where it intersects with 42° 1.632' north latitude and 70° 31.950' west longitude; thence in a straight line in a south southeasterly direction to where it intersects with 42° 0.984' north latitude and 70° 31.464' west longitude; thence in a straight line in a west southwesterly direction to where it intersects with 42° 0.200' north latitude at the southeastern coastline of Gurnett Point in Plymouth; thence in a northwesterly direction along the shoreline and concluding at the starting point.

(d) Area 4 - Plymouth to Provincetown - May 1<sup>st</sup> through October 31<sup>st</sup>. Except as provided at 322 CMR 4.06(2)(k), it shall be unlawful to fish with mobile gear from May 1<sup>st</sup> through October 31<sup>st</sup> within the waters of the Area 4 Closure. The Area 4 Closure consists of those waters under the jurisdiction of the Commonwealth beginning where 42° 0.200' north latitude intersects with the southeastern shoreline of Gurnett Point in Plymouth; thence in a straight line in east northeasterly direction to where it intersects with 42° 0.984' north latitude and 70° 31.434' west longitude; thence in a straight line in south southeasterly direction to where it intersects with 41° 56.652' north latitude and 70° 28.000' west longitude; thence in a straight line in a southerly direction to where it intersects with 41° 51.227' north latitude and 70° 27.536' west longitude; thence in a straight line in a southerly direction to where it intersects with 41° 49.075' north latitude and 70° 27.289' west longitude; thence in a straight line in a southeasterly direction to where it intersects with 41° 47.978' north latitude and 70° 25.036' west longitude; thence in a straight line in an easterly direction to where it intersects with 41° 47.339' north latitude and 70° 22.520' west longitude; thence in a straight line in an easterly direction to where it intersects with 41° 47.137' north latitude and 70° 19.379' west longitude; thence in a straight line in an easterly direction to where it intersects with 41° 47.298' north latitude and 70° 16.632' west longitude; thence in a straight line in an east north

## 4.06: continued

easterly direction to where it intersects with 41° 48.630' north latitude and 70° 8.650' west longitude; thence in a straight line in a northerly direction to where it intersects with 41° 51.666' north latitude and 70° 8.130' west longitude; thence in a straight line in a northerly direction to where it intersects with 41° 56.550' north latitude and 70° 8.550' west longitude; thence in a straight line in a northwesterly direction to where it intersects with 41° 57.186' north latitude and 70° 10.000' west longitude; thence in a straight line due north along the 70° 10' meridian to where it intersects with 41° 59.658' north latitude; thence in a straight line in a northwesterly direction to where it intersects with 42° 3.498' north latitude and 70° 15.750' west longitude; thence in a straight line in a east northeasterly direction to where it intersects with 42° 3.654' north latitude at the westerly coastline of Race Point in Provincetown; and thence in a westerly direction along the shoreline of Cape Cod Bay concluding at the starting point.

(e) Area 5 - Eastham to Mashpee - May 1<sup>st</sup> through October 31<sup>st</sup>. Except as provided at 322 CMR 4.06(2)(k), it shall be unlawful to fish with mobile gear from May 1<sup>st</sup> through October 31<sup>st</sup> within the waters of the Area 5 Closure. The Area 5 Closure consists of those waters under the jurisdiction of the Commonwealth beginning where 41° 51.666' north latitude intersects with the easterly shoreline of Nauset Beach in Eastham; thence in a straight line due east to where it intersects with the three nautical mile line, as described on NOAA Chart #13246; thence following the three nautical mile line, as described on NOAA Charts #13246 and #13237 in a southerly direction to where it intersects with the 70° meridian; thence following the 70° meridian due north to where it intersects with 41° 29.805' north latitude; thence on following an arc heading in a northwesterly direction around Monomoy Island that connects the following coordinates: 41° 29.724' north latitude and 70° 1.087' west longitude; 41° 29.904' north latitude and 70° 2.335' west longitude; 41° 30.323' north latitude and 70° 3.313' west longitude; 41° 30.926' north latitude and 70° 4.079' west longitude; 41° 31.718' north latitude and 70° 4.665' west longitude; 41° 32.780' north latitude and 70° 4.665' west longitude; 41° 33.842' north latitude and 70° 4.702' west longitude; and 41° 34.748' north latitude and 70° 4.510' west longitude; thence in a straight line in a northeasterly direction to where it intersects with 41° 35.372' north latitude and 70° 3.915' west longitude; thence in a straight line in a north northwesterly direction to where it intersects with 41° 35.749' north latitude and 70° 4.098' west longitude; thence in a straight line in a north northwesterly direction to where it intersects with 41° 36.147' north latitude and 70° 4.211' west longitude; thence in a straight line in a northerly direction to the nearest point where it intersects with the three nautical mile line, as described on NOAA Chart #13237, at 41° 36.431' north latitude; thence following the three nautical mile line, as described on NOAA Chart #13237, in a westerly direction to where it intersects with 70° 28.086' west longitude; thence in a straight line in a north northwesterly direction to where it intersects with 70° 28.828' west longitude at the southerly shoreline of Succonesset Point in Mashpee; and thence in a easterly direction along the shoreline of Cape Cod concluding at the starting point.

(f) Area 6A - Mashpee to Falmouth ½ Nautical Mile Closure - June 1<sup>st</sup> through October 31<sup>st</sup>. Except as provided at 322 CMR 4.06(2)(k), it shall be unlawful to fish with mobile gear from June 1<sup>st</sup> through October 31<sup>st</sup> within the waters of the Area 6A Closure. The Area 6A Closure consists of those waters under the jurisdiction of the Commonwealth beginning where 70° 39.310' longitude intersects with the southerly shoreline of Nobska Point in Falmouth; thence in a straight line in a south southeasterly direction to where it intersects with 41° 30.498' north latitude and 70° 39.114' west longitude; thence eastward along an imaginary line that is ½ nautical mile from the shoreline to where it intersects with 41° 32.868' north latitude and 70° 28.806' west longitude; thence in a straight line in a northerly direction to where it intersects with 70° 28.908' west longitude at the southerly shoreline of Succonesset Point in Mashpee; and thence in a westerly direction along the shoreline of Cape Cod concluding at the starting point.

(g) Area 6B - Mashpee to Falmouth ¼ Nautical Mile Closure - April 23<sup>rd</sup> through May 31<sup>st</sup>. Except as provided at 322 CMR 4.06(2)(k), it shall be unlawful to fish with mobile gear from April 23<sup>rd</sup> through May 31<sup>st</sup> within the waters of the Area 6B Closure. The Area 6B Closure consists of those waters under the jurisdiction of the Commonwealth beginning where 70° 39.310' longitude intersects with the southerly shoreline of Nobska Point in Falmouth; thence in a straight line in a south southeasterly direction to where it intersects with 41° 30.703' north latitude and 70° 39.191' west longitude; thence eastward along an imaginary line that

## 4.06: continued

is ¼ nautical mile from the shoreline to where it intersects with 41° 33.134' north latitude and 70° 28.854' west longitude; thence in a straight line in a northerly direction to where it intersects with 70° 28.908' west longitude at the southerly shoreline of Succonessett Point in Mashpee; and thence in a westerly direction along the shoreline of Cape Cod concluding at the starting point.

(h) Area 7 - Southern Shore of the Elizabeth Islands - May 1<sup>st</sup> through October 31<sup>st</sup>. Except as provided at 322 CMR 4.06(2)(k), it shall be unlawful to fish with mobile gear from May 1<sup>st</sup> through October 31<sup>st</sup> within the waters of the Area 7 Closure. The Area 7 Closure consists of those waters under the jurisdiction of the Commonwealth beginning where 70° 56.898' longitude intersects with the southerly shoreline of Cuttyhunk Island in Gosnold; thence in a straight line in a southeasterly direction to where it intersects with 41° 24.420' north latitude and 70° 56.628' west longitude; thence east northeasterly direction following an imaginary line that is ¼ nautical mile from the shoreline to where it intersects with 41° 30.703' north latitude and 70° 39.191' west longitude; thence in a straight line in a north northwesterly direction to where it intersects with 70° 39.310" west longitude at the southerly shoreline of Nobska Point in Falmouth; and thence in a westerly direction along the southern shoreline of the Elizabeth Islands concluding at the starting point.

(i) Area 8A - Nantucket Island North Shore - April 1<sup>st</sup> through April 30<sup>th</sup>. Except as provided at 322 CMR 4.06(2)(k), it shall be unlawful to fish with mobile gear from April 1<sup>st</sup> through April 30<sup>th</sup> within the waters of the Area 8A Closure. The Area 8A Closure beginning where 70° 2.980' longitude intersects with the northerly shoreline of Great Point on Nantucket Island; thence in a straight line in a north northeasterly direction to the nearest point where it intersects with the three nautical mile line, as described on NOAA Chart #13237, at 70° 2.124' west longitude; thence in a westerly direction along the three nautical mile line, as described on NOAA Chart #13237, to where it intersects with 70° 19.499' west longitude; thence in a straight line in a south southwesterly direction to where it intersects with 41° 21.852' north latitude and 70° 20.686' west longitude; thence in a straight line in a southeasterly direction to where it intersects with 70° 12.431" west longitude at the northerly shoreline of Eel Point on Nantucket Island; and thence in a easterly direction along the northern shoreline of Nantucket Island concluding at the starting point.

(j) Area 8B - Great Point and Nantucket Harbor - June 1<sup>st</sup> through September 15<sup>th</sup>. Except as provided at 322 CMR 4.06(2)(k), it shall be unlawful to fish with mobile gear from June 1<sup>st</sup> through September 15<sup>th</sup> within the waters of the Area 8B Closure. The Area 8B Closure beginning where 70° 2.980' longitude intersects with the northerly shoreline of Great Point on Nantucket Island; thence in a straight line in a south southwesterly direction to where it intersects 41° 19.060' north latitude and 70° 6.313' west longitude; thence due south to where it intersects with the northern shoreline at the western end of the entrance to Nantucket Harbor; and thence in a easterly direction along the northern shoreline of Nantucket Island concluding at the starting point.

(k) General Exemptions to Seasonal Mobile Gear Closures. The following exemptions shall apply to the seasonal mobile gear closures set forth at 322 CMR 4.06(2)(a) through (j):

1. Purse Seine Exemption. A vessel fishing under the authority of a Coastal Access Permit - Purse Seine regulated fishery permit endorsement, issued in accordance with 322 CMR 7.01(4)(a), may fish with purse seine gear within the seasonal mobile gear closures.

2. Inshore Net. A vessel fishing in the inshore net areas, as described at 322 CMR 4.02, under the authority of an Inshore Net Fishery regulated fishery permit endorsement issued in accordance with 322 CMR 4.02(3) and 7.01(4)(a), may fish with purse seine gear inside the seasonal mobile gear closures if so authorized by the conditions set forth in said Inshore Net Permit, adopted pursuant to 322 CMR 7.01(7).

3. Surf Clam and Ocean Quahog Dredges. A vessel fishing under the authority of a Surf Clam and Ocean Quahog Dredge regulated fishery permit endorsement, issued in accordance 322 CMR 7.01(4)(a), may fish with surf clam and ocean quahog dredges within the seasonal mobile gear closures areas in accordance with 322 CMR 6.08.

4. Bay Quahog Dredge Fishery. A vessel fishing under the authority of a Bay Quahog Dredge regulated fishery permit endorsement, issued in accordance with 322 CMR 7.01(4)(a), may fish with bay quahog dredges within the seasonal mobile gear closures in accordance with 322 CMR 6.36. As bay quahogs are jointly managed by municipalities pursuant to M.G.L. c. 130 § 52 and the seasonal mobile gear closures may overlap with municipal waters the harvest of bay quahogs within these municipal waters may also be subject to municipal permitting requirements and harvest regulations.

## 4.06: continued

5. Municipal Shellfish Fisheries. The seasonal mobile gear closure areas shall not apply to vessels fishing within municipal waters in a shellfish fishery regulated by the municipality.

(3) Night Closures. Within the waters under the jurisdiction of the Commonwealth, it shall be unlawful for any vessel using mobile gear to conduct any night fishing.

(4) Trawl Gear General Provisions.

(a) Minimum Trawl Net Mesh Size and Method of Measurement. Except as authorized at 322 CMR 4.06(5), all vessels fishing with trawl gear within the waters under the jurisdiction of the commonwealth shall only possess fish taken with nets that have a minimum mesh size opening that measures at least 6 ½ inches throughout the cod end and six inches throughout the remainder of the net.

The mesh size shall be measured by the inside stretch of the net. The mesh size will be determined by the average of measurements of any series of 20 consecutive meshes. The mesh in the cod end will be measured at least ten meshes from the lacings beginning at the after end and running parallel to the long axis.

This minimum net mesh size is measured in accordance with 322 CMR 4.06(4)(a), by using a wedge-shaped gauge having a taper of two centimeters (0.79 inches) in eight centimeters (3.15 inches), and a thickness of 2.33 millimeters (0.09 inches), inserted into the meshes under a pressure or pull of eight kilograms (17.64 pounds).

(b) Trawl Net Modifications.

1. It shall be unlawful to use any device or material including, but not limited to, nets, net strengtheners, ropes, lines or chafing gear on the top of the trawl net, except that one splitting strap and one bull rope (if present), consisting of line and rope no more than three inches in diameter, may be used if such a splitting strap or bull rope does not constrict in any manner the size of the meshes on the top of the trawl net, as required at 322 CMR 4.06(4)(a).

2. All trawl nets not made on a braiding machine, whether of braided or twisted twine, whether machine made or hand-made, shall use only one knot: the weavers knot. This shall include the sheet bend or knot by another name that is the weavers knot.

3. The ends of the twine, called the bars, that exit the knot are constructed so their lay does not cross or twist.

4. One splitting strap or one bull rope consisting of line or rope no more than two inches in diameter may be used if such splitting strap or bull rope does not obstruct the meshes of the net or otherwise diminish the sizes of the net mesh.

5. Canvas, netting or other material may be attached to the underside of the cod end to reduce wear and prevent damage provided that no more than 25% of the meshes in the cod end are obstructed.

6. It shall be unlawful to use trawl nets that utilize disks, rollers or rock-hoppers greater than 12 inches.

(5) Exempted Small Mesh Trawl Fisheries. To authorize commercial trawl fishermen to seasonally target valuable finfish species that cannot be caught in commercially viable quantities without the use of small mesh trawls, the following exemptions to 322 CMR 4.06(4) apply.

(a) Small Mesh Trawl Squid Fishery. It shall be lawful to fish with small mesh trawls for squid in accordance with the following requirements:

1. Permitting. The vessel holds a Coastal Access Permit further endorsed for Small Mesh Trawl Squid, issued in accordance with M.G.L. c. 130, § 80, and 322 CMR 7.01(4)(a).

2. Season. The vessel is fishing within the Small Mesh Squid Trawl Exempted Area during the period of April 23<sup>rd</sup> through June 9<sup>th</sup>. The Director may issue permit conditions, in accordance with M.G.L. c. 130, § 80, and 322 CMR 7.01(7) to extend the small mesh trawl squid fishery season.

3. Net Mesh Size and Method of Measurement. The vessel uses small mesh trawls with meshes measuring at least 1 7/8-inch diamond or square throughout the cod end.

## 4.06: continued

This standard shall be applied throughout the cod end for at least 150 continuous meshes forward of the terminus of the net. For cod ends with less than 150 meshes forward of the terminus of the net, this minimum mesh size shall be applied to a minimum of  $\frac{1}{3}$  of the net measured from the terminus of the cod end to the head rope. Meshes shall be measured using a wedge-shaped gauge having a taper of two centimeters (0.79 inches) in eight centimeters (3.15 inches), and a thickness of 2.33 millimeters (0.09 inches), inserted into the meshes under a pressure or pull of five kilograms (11.02 pounds).

4. Modifications to Strengthen the Net. The vessel shall not use any device, gear or material applied to the top of the trawl net, except the following:

- a. Splitting straps and or bull ropes or wire around the entire circumference of the cod end, provided these materials do not obstruct or constrict the top of the trawl net while it is being towed.
- b. Net strengtheners or net covers that do not have a mesh opening of at least five inches diamond or square, as measured by the methods described at 322 CMR 4.06(4)(a).
- c. A line may be used to close the opening created by the rings in the aftermost portion of the net, provided the liner extends no more than ten meshes forward of the aftermost portion of the net, the inside webbing of the cod end shall be the same circumference or less than any strengthener and the liner is no more than two feet longer than any net strengthener.

5. Catch Restrictions. Vessels fishing with or in possession of any net that does not comply with the minimum trawl net mesh size at 322 CMR 4.06(4)(a) are prohibited from retaining, possessing or landing more than 100 pounds of winter flounder, yellowtail flounder or summer flounder, in any combination.

(b) Area 1A and Upper Cape Cod Raised Foot Rope Trawl Fisheries for Whiting Fishery. It shall be lawful to fish with small mesh raised footrope trawls for whiting in accordance with the following requirements:

1. Permitting.

- a. Area 1A Exempted Whiting Fishery. The vessel holds a Coastal Access Permit further endorsed for Small Mesh Trawl Whiting and North Shore Mobile Gear, issued in accordance with M.G.L. c. 130, § 80, and 322 CMR 7.01(4)(a).
- b. Upper Cape Cod Whiting Fishery. The vessel holds a Coastal Access Permit further endorsed for Small Mesh Trawl Whiting, issued in accordance with M.G.L. c. 130, § 80, and 322 CMR 7.01(4)(a).

2. Season.

- a. Area 1A. The vessel is fishing within Area 1A, as described at 322 CMR 4.06(2)(a)(1)(a), during the period of September 1<sup>st</sup> through September 30<sup>th</sup>.
- b. Upper Cape Cod. The vessel is fishing within the Upper Cape Cod Whiting Area during the period of September 1<sup>st</sup> through November 20<sup>th</sup>.

3. Trawl Specifications. The trawl used by the vessel shall conform to the gear specifications below:

- a. Minimum Net Mesh Size and Method of Measurement. The net meshes shall measure at least 2  $\frac{1}{2}$ -inch diamond or square throughout the cod end. Minimum mesh size is measured by the inside stretch of the net. Meshes shall be measured using a wedge-shaped gauge having a taper of two centimeters (0.79 inches) in eight centimeters (3.15 inches), and a thickness of 2.33 millimeters (0.09 inches), inserted into the meshes under a pressure or pull of five kilograms (11.02 pounds).
- b. Headrope. The trawl shall be configured with a headrope that conforms to the following requirements:
  - i. The headrope is rigged with floats that measure at least eight inches in diameter.
  - ii. The floats are attached along the entire length of the headrope with a maximum spacing of four feet between each float.
- c. Groundgear. The trawl shall be configured with groundgear that conforms to the following requirements:
  - i. All bare wire groundgear that is not larger than  $\frac{1}{2}$  inch in diameter for the top leg,  $\frac{5}{8}$  inch in diameter for the bottom leg and not larger than  $\frac{3}{4}$  inch diameter for the ground cables.

## 4.06: continued

- ii. The top legs shall be at least as long as the bottom legs.
  - iii. The total length of ground cables shall not be greater than 40 fathoms (240 feet) from the trawl doors to the wing ends.
- d. Footrope. The trawl shall be configured with a footrope that conforms to the following requirements:
  - i. The footrope is longer than the headrope, but by no more than 20 feet longer than the headrope.
  - ii. The footrope is rigged so it does not touch the ocean floor when towed.
- e. Drop Chains. The trawl shall be configured with drop chains that conform to the following requirements:
  - i. The drop chains are at least 42 inches in length.
  - ii. The maximum size of the drop chain stock shall be  $\frac{5}{16}$  inch when a sweep is used and  $\frac{3}{8}$  inch when no sweep is used.
  - iii. Only bare chain shall be used. The use of additional weights on the drop chains is prohibited.
  - iv. Drop chains shall be hung from the center of the footrope and the corners (the junction of the bottom wing to the belly at the foot rope).
  - v. Drop chains shall be hung at eight-foot intervals along the footrope from the corners to the wing ends.
- f. Sweep Specifications. The use of a chain sweep is not required. However, if a chain sweep is used it must conform to the following requirements.
  - i. The sweep shall be bare chain measuring no greater than  $\frac{5}{16}$  inch chain stock.
  - ii. The sweep shall be the same length as the foot rope.
  - iii. The sweep shall be attached to the ends of the drop chains and the center of the sweep must be attached to the drop chain from the center of the footrope.
  - iv. The points where each drop chain is attached on the sweep and the foot rope must be the same distance from the center drop chain attachments.
  - v. The ends of the sweeps shall be attached to the drop chains at the center of the footrope.
- 4. Bycatch Restrictions. The vessel does not retain, possess or land any cod, haddock, pollock, redfish, white hake, yellowtail flounder, winter flounder, American plaice, witch flounder, summer flounder, skates, monkfish, ocean pout, sculpin, sea raven, lobsters or crabs.

(6) Sea Scallop Dredge Gear

- (a) Dredge Width. It shall be unlawful to possess a sea scallop dredge or retain sea scallops caught by a dredge whereby the dredge or a combination of dredges has an effective fishing width greater than ten feet while fishing within the waters under the jurisdiction of the Commonwealth.
- (b) Dredge Rings.
  - 1. Minimum Size. It shall be unlawful to possess a sea scallop dredge or retain sea scallops caught by a dredge with rings less than four inches.
  - 2. Method of Measurement. The minimum ring size shall be determined by measuring the length of the shortest straight line passing through the center of the ring from one inside edge to the opposite inside edge. The measurement shall not include normal welds from ring manufacturing or links. The rings to be measured shall be at least five rings away from the mouth of the dredge and at least two rings away from the other rigid portions of the dredge.
- (c) Twine Top.
  - 1. Minimum Twine Top Net Mesh Size. It shall be unlawful to possess a sea scallop dredge or retain sea scallops caught by a dredge using twine top with a net mesh of less than ten inches square or diamond.
  - 2. Twine Top Configuration. It shall be unlawful to configure or construct the twine top in any manner that obstructs the net mesh so that it is less than ten inches square or diamond.

- (7) Experimental Fisheries. The Director may, at his or her discretion, authorize the use of nonconforming trawls. This will be done to collect data to determine if certain gear modifications may be appropriate. Permit holders must request and obtain a Letter of Authorization to participate in any authorized experimental fishery.

4.06: continued

(8) Declaration of Temporary Mobile Gear Closures. The Director may declare temporary mobile gear closures within the waters under the jurisdiction of the Commonwealth, if the Director has determined that the closure is necessary to immediately resolve gear conflicts due to high densities of fixed fishing gear or to protect high densities of molted lobsters.

(a) Procedure for Declaring Temporary Mobile Gear Closures. The declaration of a temporary closure is not effective until:

1. It has been approved by a majority of the Marine Fisheries Advisory Commission.
2. A notice of closure has been filed with the *Massachusetts Register* and published or posted in conspicuous places accessible to fishermen. The notice of closure must state:
  - a. a determination of need or basis for the closure;
  - b. the exact area to be closed; and
  - c. the duration during which the closure will be in effect.
3. During the temporary closure the Director shall consider comments on the closure by the public or a state or federal agency. Based on these written comments the Director may alter, amend or rescind the closure in accordance with this procedure.

(9) Gear Retrieval. Any vessel using mobile gear whose gear becomes entangled with ghost gear may haul said ghost gear on board for the purpose of identification and shall return the ghost gear to the rightful owner, if authorized in writing by said owner of the ghost gear.

(10) Prohibitions. It shall be unlawful:

- (a) to violate any provision of 322 CMR 4.06;
- (b) for any vessel or its occupants to molest, damage, destroy, cut or deface any fixed and stable fishing gear;
- (c) for any vessel or its occupants to possess any ghost gear without proper written authorization of the owner;
- (d) for any vessel to retain, possess or land any lobsters harvested by mobile gear within the waters under the jurisdiction of the Commonwealth.
- (e) to use in any manner any mobile fishing gear in or possess any fish, including finfish, shellfish or crustaceans, harvested from an area which has been closed pursuant to 322 CMR 4.06(8).

(4.08: Fishing and Shellfish Equipment: (Reserved))

4.09: Restrictions on Hook and Line Gear

Use of Natural Bait with Embedded or Attached Weights. It shall be unlawful for any person to fish with natural bait that has been rigged with embedded or attached weights or other materials, unless such weights or other materials are attached to the end of the fishing line.

4.11: Marking of Dive Gear

(1) Dive Fishing for Lobsters. Any person authorized to take lobster by dive gear, in accordance with M.G.L. c. 130, §§ 37, 38 or 80, and 322 CMR 7.01(2): *Commercial Fisherman Permits* or (4): *Special Permits*, shall mark a floating marker, described at M.G.L. c. 130, § 38A so as to display the permit number assigned by the Director. The permit numbers shall be not less than three inches in height nor less than ½ inch in thickness or width of line.

(2) Marking of SCUBA Air Tanks. Any person authorized to take lobster by dive gear, in accordance with M.G.L. c. 130, §§ 37, 38 or 80, and 322 CMR 7.01(2): *Commercial Fisherman Permits* or (4): *Special Permits*, that is using SCUBA gear shall mark the air tank(s) of the diver to display the permit number assigned by the Director. The permit numbers shall be not less than three inches in height nor less than ½ inch in thickness or width of line.

4.12: Use of Nets for Taking Striped Bass (*Morone Saxatilis*) or Shad (*Alosa Sapidissima*)

(1) It is unlawful to offload onto any vessel within waters under the jurisdiction of Massachusetts or to offload or land onto any pier, wharf or other structure within Massachusetts any striped bass or shad which was harvested, caught or taken by any net.

322 CMR 6.00: REGULATION OF CATCHES

Section

- (6.01: Future Regulation of Lobsters or Finfish: (Reserved))
- 6.02: Lobster Conservation and Management
- 6.03: Regulated Multi-species Groundfish
- 6.04: Atlantic Bluefin Tuna
- 6.05: Atlantic Sea Scallop (*Placopecten Magellanicus*) Management
- 6.06: Atlantic Salmon Restoration
- 6.07: Striped Bass Fishery (*Morone Saxatilis*)
- 6.08: Surf Clam and Ocean Quahog Fisheries
- (6.09: Regulation of Catches: (Reserved))
- 6.10: Management of the Asiatic Freshwater Clam (*Corbicula Fluminea*)
- 6.11: Bay Scallops Harvest Criteria
- 6.12: Fish Pot Fishery Restrictions
- 6.13: Lobster Trap Limit in the Coastal Waters of the Commonwealth
- 6.14: Lobster Car Restrictions
- (6.15: Further Regulation of Catches: (Reserved))
- 6.16: Atlantic Sturgeon Prohibition
- 6.17: Shad and River Herring
- 6.18: Bluefish Limits (*Pomatomus Salatrix*)
- 6.19: Edible Crab Management
- 6.20: Quahogs, Soft Shelled Clams and Oysters
- 6.21: Whelk Conservation and Management
- 6.22: Summer Flounder (Fluke) Restrictions
- 6.23: Rainbow Smelt (*Osmerus Mordax*) Restrictions
- 6.24: Sea Urchin Management
- 6.25: Lobster Landing Window
- 6.26: Bycatch Lobster Landing/Possession Limits
- 6.27: Scup Fishery Management
- 6.28: Black Sea Bass Fishery Management
- 6.29: Acushnet River Estuary Fisheries Closures
- 6.30: American Eels
- 6.31: Trap Tags
- 6.32: Shell-on Lobster Parts
- 6.33: Lobster Conservation Management Areas
- 6.34: Horseshoe Crab Management
- 6.35: Spiny Dogfish Management
- 6.36: Quahog Dredge Management in State Waters
- 6.37: Coastal Shark Conservation and Management
- 6.38: Shellfish Landing Restrictions Necessitated by Marine Biotoxins
- 6.39: *Loligo* Squid Management
- 6.40: Tautog Fishery Limits
- 6.41: The Further Regulation of Possession and Size Limits
- 6.42: Other Minimum Sizes and Possession Limits
- 6.43: Atlantic Menhaden Management

(6.01: Future Regulation of Lobsters or Finfish: (Reserved))

6.02: Lobster Conservation and Management

(1) Definitions. For the purpose of 322 CMR 6.02, the following terms have the following meanings:

Commercial Fisherman means any person permitted in accordance with M.G.L. c. 130, §§ 37, 38 and 80 and 322 CMR 7.01(2)(a): *Coastal Lobster* and (b): *Offshore Lobster*, to catch, possess and land lobster for the purpose of sale, barter or exchange or that keeps for personal or family use any lobster taken under the authority of said permit.

Escape Vent means one or more unobstructed rectangular vent or opening or two or more unobstructed round openings in the parlor of the pot.

6.04: continued

- (6) Reservation. The Division has determined that:
  - (a) 322 CMR 6.04 is intended to concurrently apply with 50 CFR Part 285, and is consistent with conservation and management of tuna under recommendations made by the International Commission for the Conservation of Atlantic Tunas; and
  - (b) any Special Acts of the Massachusetts Legislature governing purse seining activities in the territorial waters of Massachusetts are fully applicable and are not superseded or otherwise repealed by operation of law pursuant to M.G.L. c. 130, §§ 17A and 104.
- (7) Prohibitions. It shall be unlawful for any person:
  - (a) to fish for tuna with a purse seine without a valid commercial fisherman permit and a regulated fishery permit issued by the Division;
  - (b) to fish for tuna with a purse seine prior to September 1<sup>st</sup>, of any year;
  - (c) to violate any conditions as set forth in the Statement of Conditions issued to any person who has received a valid regulated fishery permit;
  - (d) to fish for tuna with a purse seine during a period of permit suspension or revocation under 322 CMR 6.04(5);
  - (e) to harass, intimidate, disrupt, obstruct, conflict or interfere with the fishing activity of any other fishing vessel, sport boat, party boat, charter boat or head boat, or damage any fixed fishing gear;
  - (f) to fish for tuna with a purse seine within Cape Cod Bay, as those waters are set forth in 322 CMR 6.04(3)(d), on any weekend, defined as the 48 hour period beginning on Friday midnight and ending on Sunday midnight, or on any Massachusetts or federal holiday, during the period September 1<sup>st</sup> through September 30<sup>th</sup>, unless the federal tuna quota in the general category has been reached;
  - (h) to fish for tuna with a purse seine during the period September 1<sup>st</sup> through September 15<sup>th</sup> in those waters set forth in 322 CMR 6.04(3)(e) unless the federal tuna quota in the general category has been reached; or
  - (i) to fish for tuna by means of a purse seine without supplying the Director with a written report of the location(s), time(s), date(s), and catch of each purse seine set upon the completion of each fishing day.
- (8) Penalties. Violation of any provision of 322 CMR 6.00 shall be punishable by:
  - (a) a fine of not less than \$10 nor more than \$1,000 or
  - (b) suspension and/or revocation of the commercial fisherman permit and the regulated fishery permit; or
  - (c) forfeiture of all tuna unlawfully taken or the proceeds thereof; or
  - (d) forfeiture of all boats, vehicles and apparatus used in violation of 322 CMR 6.00; or
  - (e) any combination of the above.

6.05: Atlantic Sea Scallop (*Placopecten Magellanicus*) Management

- (1) Definitions.
 

Commercial Fisherman means any person or vessel permitted in accordance with 322 CMR 7.01(2): *Commercial Fisherman Permits*.

Discard means the return of live sea scallops to the sea.

Exclusive Economic Zone means all waters extending from the seaward boundary of the waters under the jurisdiction of the Commonwealth to two-hundred nautical miles from the coast.

Land means to transfer or attempt to transfer catch onto any land, pier, wharf, dock or other artificial structure or for a fishing vessel with any fish on board to tie-up to any dock, pier or other artificial structure.

Sea Scallop means the species known as *Placopecten magellanicus*.

Shuck means to remove from the shell and retain only the edible adductor muscle of a sea scallop.

Standard Fish Tote means a fish tote that does not exceed the volume of 6525 cubic inches.
- (2) Minimum Size.
  - (a) It is unlawful to fish for, catch, take, have on board, or off-load from any fishing vessel, Atlantic Sea Scallops the shells of which are less than 3½ inches in diameter from the hinge to the outer edge.

## 6.05: continued

(b) Notwithstanding 322 CMR 6.05(2)(a), it is lawful to fish for, catch, take, have on board, or off-load from any fishing vessel Atlantic Sea Scallops with shells less than 3½ inches in the longest diameter provided said Atlantic Sea Scallops comprise no more than 10% of the entire lot of Atlantic Sea Scallops. This 10% tolerance shall be determined by numerical count taken at random of not less than one peck no more than four pecks of the entire lot of Atlantic Sea Scallops.

(3) Possession and Landing Limits.(a) Possession and Landing Limits.

1. Shucked Sea Scallops. It shall be unlawful for any commercial fisherman to, at any time, possess or land more than 200 lbs. of shucked sea scallops;
2. Whole In-shell Sea Scallops. It shall be unlawful for any commercial fisherman to, at any time, possess or land more than 2,000 lbs. of whole in-shell sea scallops
  - a. Possession Equivalency. For any commercial fisherman landing both whole in-shell sea scallops and shucked sea scallops the weight of whole in-shell sea scallops shall be multiplied by .10 to determine compliance with the possession and landing limits.
  - b. Volumetric Equivalency.
    - i. All whole in-shell sea scallops shall be placed in level filled standard fish totes upon landing;
    - ii. A level filled standard fish tote shall represent 100 lbs. of whole in-shell sea scallops
3. Exemption. Vessels permitted by the National Marine Fisheries Service to commercially harvest and land Atlantic sea scallops may possess and land more than the state possession and daily landing limits provided:
  - a. The vessel transits directly through the waters under the jurisdiction of the Commonwealth for the purpose of landing sea scallops;
  - b. The vessel makes no stops unless otherwise directed by the Massachusetts Environmental Police for the purpose of boarding and inspection;
  - c. The dredge gear is out of the water and properly stowed on board; and
  - d. The vessel, crew, gear and catch is otherwise in compliance with the applicable federal regulations.

(4) Commercial Harvest, Discarding and Disposition of Catch.

- (a) It shall be unlawful to fish for, harvest, possess or land sea scallops taken from the waters of the Exclusive Economic Zone unless so authorized by a sea scallop permit issued by the National Marine Fisheries Service;
- (b) It shall be unlawful to discard any sea scallops within the restricted coastal waters of the Commonwealth, as established at 322 CMR 4.02: *Use of Nets in Inshore Restricted Waters*; and
- (c) It shall be unlawful to land sea scallops in shell unless the area where the sea scallops were harvested from is classified as "Approved" by the Division of Marine Fisheries in accordance with the National Shellfish Sanitation Program.

(5) Recreational Fishery Limit. In any one day, it is unlawful for a recreational fisherman to harvest or possess more than one bushel of whole scallops or four quarts of shucked scallops for personal use.

(6) Permits.

- (a) No person shall take or possess scallops in excess of the recreational fishery limits as defined in 322 CMR 6.05(3) unless licensed as a commercial fisherman under the authority of 322 CMR 7.01: *Form, Use and Contents of Permits.*
- (b) Commercial fishermen who harvest sea scallops by hand must possess a commercial permit endorsed for sea scallop diving.
- (c) No person shall be issued a commercial permit endorsed for sea scallop diving unless he or she is a *bona fide* resident of the Commonwealth or is a resident of a state that grants equal access to Massachusetts residents.
- (d) Each individual diver on board a vessel where the scallop quantities exceed the recreational possession limit as noted in 322 CMR 6.05(3) must possess a commercial permit endorsed for sea scallop diving.

6.05: continued

(e) Commercial fishermen who harvest sea scallops by mobile gear from waters under the jurisdiction of the Commonwealth must possess a Coastal Access commercial permit as defined in 322 CMR 7.05: *Coastal Access Permit (CAP)*.

6.06: Atlantic Salmon Restoration

(1) Purpose. 322 CMR 6.06 is in support of the international management program for Atlantic salmon and interstate Atlantic salmon restoration programs.

(2) Prohibition. It shall be unlawful to harvest, catch, take, possess, transport, sell or offer to sell any Atlantic salmon from the coastal waters of the Commonwealth or from the U.S. Exclusive Economic Zone.

(3) Incidental Catch. All Atlantic salmon caught incidental to fisheries directed towards other species must be released in such a manner as to insure maximum probability of survival.

(4) Presumption. The possession of Atlantic salmon will be *prima facie* evidence that such Atlantic salmon were taken in violation of 322 CMR 6.06. Evidence that such fish were harvested from foreign waters or from aquaculture enterprises will be sufficient to rebut the presumption. This presumption does not apply to fish being sorted on deck.

6.07: Striped Bass Fishery (*Morone Saxatilis*)

(1) Purpose and Scope. Since approximately October 1981 the Atlantic coastal states, through the auspices of the Atlantic States Marine Fisheries Commission (ASMFC), have been developing conservation and management measures to arrest the severe decline in the stocks of striped bass and to manage restored stocks. This cooperative management effort has been successful and as a consequence, the Chesapeake Bay Stock of the Atlantic Coast striped bass resource has been declared recovered as of January 1, 1995.

The following regulations represent the Commonwealth's response to this cooperative and joint coastal state conservation management effort. The objective of 322 CMR 6.07 is to allow controlled sustained recreational and commercial fishing for striped bass pursuant to the provisions of the ASMFC striped bass Fishery Management Plan.

322 CMR 6.07 is designed to identify the various user groups, implement conservation and management measures tailored to each group, and collects accurate statistics on striped bass catch levels. Persons intending to fish for striped bass have the option of classifying their activity as recreational or commercial. If a person intends to catch striped bass only for personal consumption and not for sale, that person must have a recreational saltwater fishing permit, and may fish year round, and retain striped bass that measure between 28 inches and less than 35 inches, but may not retain more than one striped bass within any 24-hour period.

Any person intending to catch and possess striped bass for the purpose of sale, barter or exchange must be fishing under the authority of a commercial permit and a regulated fishery permit for striped bass. However, 322 CMR 6.07 establishes a commercial fishing season that closes upon reaching the commercial catch quota, establishes a minimum commercial size of 35 inches, and requires fish to be sold only to dealers licensed and authorized by the Commonwealth.

Finally, 322 CMR 6.07 allows wholesale and retail dealers to purchase and sell striped bass under certain conditions. To purchase striped bass directly from commercial fishermen, wholesale and retail dealers must be authorized as primary buyers of striped bass and must affix a Striped Bass ID Tag to all striped bass at the time of primary purchase from the commercial fisherman. Striped bass imported into the Commonwealth must be marked with a numbered tag that identifies the state of origin and must be accompanied by documents that verify state of origin. Nonconforming (undersized) striped bass that were caught in the wild may be imported into the Commonwealth provided those fish were legally taken, shipped and meet documentation requirements of the state-of-origin.

(2) Definitions. For purposes of 322 CMR 6.07, the following words shall have the following meanings:

322 CMR: DIVISION OF MARINE FISHERIES

6.08: Surf Clam and Ocean Quahog Fisheries

(1) Definitions. For the purposes of 322 CMR 6.08, the following words shall have the following meanings:

Batch means all shellfish in each separate container.

6.08: continued

Bushel means an industry standard bushel of 1.88 cubic feet in volume.

Cage means an industry standard container which is 60 cubic feet in volume and holds 32 bushels of clams in the shell.

Commercial Fishing means to harvest, catch or take surf clams or ocean quahogs for purposes of sale.

Container means any bag, box, basket, cage, or other receptacle containing loose shellfish which may be separated from the entire load or shipment.

Director means the Director of the Massachusetts Division of Marine Fisheries.

Dredge means any of a variety of towed devices which utilize blades, knives, or teeth to dig into the substrate and remove surf clams or ocean quahogs, including the hydraulic dredge which utilizes pumped water to enhance fishing performance.

Dredging means the use of a dredge to harvest surf clams or ocean quahogs within the territorial waters of the Commonwealth.

Effective Fishing Width means the width of the sea bottom from which a dredge collects shellfish, including the width of the blades and carriers, bars, wires, suction heads or similar structures or openings, including any water jet area, which affect the swath or overall width of the path from which surf clams or ocean quahogs are taken.

Ocean Quahog means that species of shellfish known as *Arctica Islandica*.

Surf Clam means that species of shellfish known as *Spisula solidissima*.

Vessel means any fishing vessel which is licensed to operate for commercial purposes under the authority of M.G.L. c. 130, or any commercial fishing vessel which is operated for commercial purposes by any person licensed under the authority of M.G.L. c. 130.

(2) Management Areas. The following prohibitions shall apply to the following areas:

- (a) Dredging for surf clams is prohibited from November 1<sup>st</sup> to April 30<sup>th</sup>, within an area shoreward of the 12 foot depth contour as measured at mean low water beginning at Point Allerton, Hull, and extending southerly to the Massachusetts - Rhode Island Boundary, including Cape Cod and the Islands.
- (b) Dredging for surf clams is prohibited from May 1<sup>st</sup> to October 31<sup>st</sup>, within an area shoreward of the 20 foot depth contour as measured at mean low water beginning at Point Allerton, Hull and extending southerly to the Massachusetts - Rhode Island boundary, including Cape Cod and the Islands.
- (c) Dredging for surf clams is prohibited shoreward of an imaginary line drawn from Long Point, Provincetown to the "Hopper" so called in North Truro, marked "D" on NOS chart 13246.
- (d) Dredging for surf clams is prohibited shoreward of an imaginary line from Jeremy Point, Wellfleet, to the "Spire" in Brewster.
- (e) Dredging for surf clams is prohibited inside an imaginary line from Seal Rocks off Scraggy Neck, Bourne, to the southernmost tip of Sandy Point Dike, Wareham.
- (f) Dredging for surf clams is prohibited from May 1<sup>st</sup> to October 31<sup>st</sup>, within an area measured from an imaginary line one mile seaward from mean low water from Great Point Light to Sankaty Light, Nantucket.
- (g) Commercial surf clam and ocean quahog management areas may be opened or closed for sanitary purposes by following established procedures for the sanitary control of shellfish growing areas. Fishermen holding special permits for the harvest of these species shall be notified in writing of changes in classification status.
- (h) The provisions of 322 CMR 6.08(2)(a) and (b) shall not apply to the waters of the Town of Gay Head.

## 6.08: continued

(i) The provisions of 322 CMR 6.08(2)(a) and (b) shall not apply to the waters of the Town of Chatham bordering on Nantucket Sound which are found within an imaginary line drawn from a flag marker with radar reflector at Loran C 9960-W-13872.5, 9960-Y-43937.5 as shown NOS Chart 13237; thence proceeding easterly along the 43937.5 line to the western shore of Monomoy Island; thence proceeding in a southerly direction along the shoreline to the 43928 line; thence proceeding westerly along the 43928 line to a flag marker with radar reflector at 9960-W-13875, 9960-Y-43928; thence proceeding in a northerly direction to a pole at 9960-W-13874.2, 9960-Y-43930.4; thence proceeding to a pole at 9960-W-13873.2, 9960-Y-43934.0; thence proceeding to the starting point at 9960-W-13872.5, 9960-Y-43937.5.

(j) The provisions of 322 CMR 6.08(2)(a) and (b) shall not apply to the waters of the town of Nantucket bounded as follows: beginning at the intersection of the Loran C 9960-X-25130 line with the shoreline at Madaket Beach, as shown on NOS chart 13237; thence proceeding northwesterly to the end of Madaket Beach; thence following an imaginary straight line to the southwesternmost point of Esther Island; thence following an imaginary straight line to the southernmost tip of Tuckernuck Island; thence following the west shore of Tuckernuck Island to its northernmost point; thence following an imaginary straight line to the southernmost point of Muskegat Island; thence following the western shore of Muskegat Island to the intersection of the Loran C 9960-X-25190 line; thence following the 9960-X-25190 line in a southerly direction to the territorial waters line; thence following the territorial waters line in a southeasterly direction to its intersection with the Loran C 9960-X-25130 line; thence following the Loran C 9960-X-25130 line in a northerly direction to the point of beginning, all as appearing on the following chart.

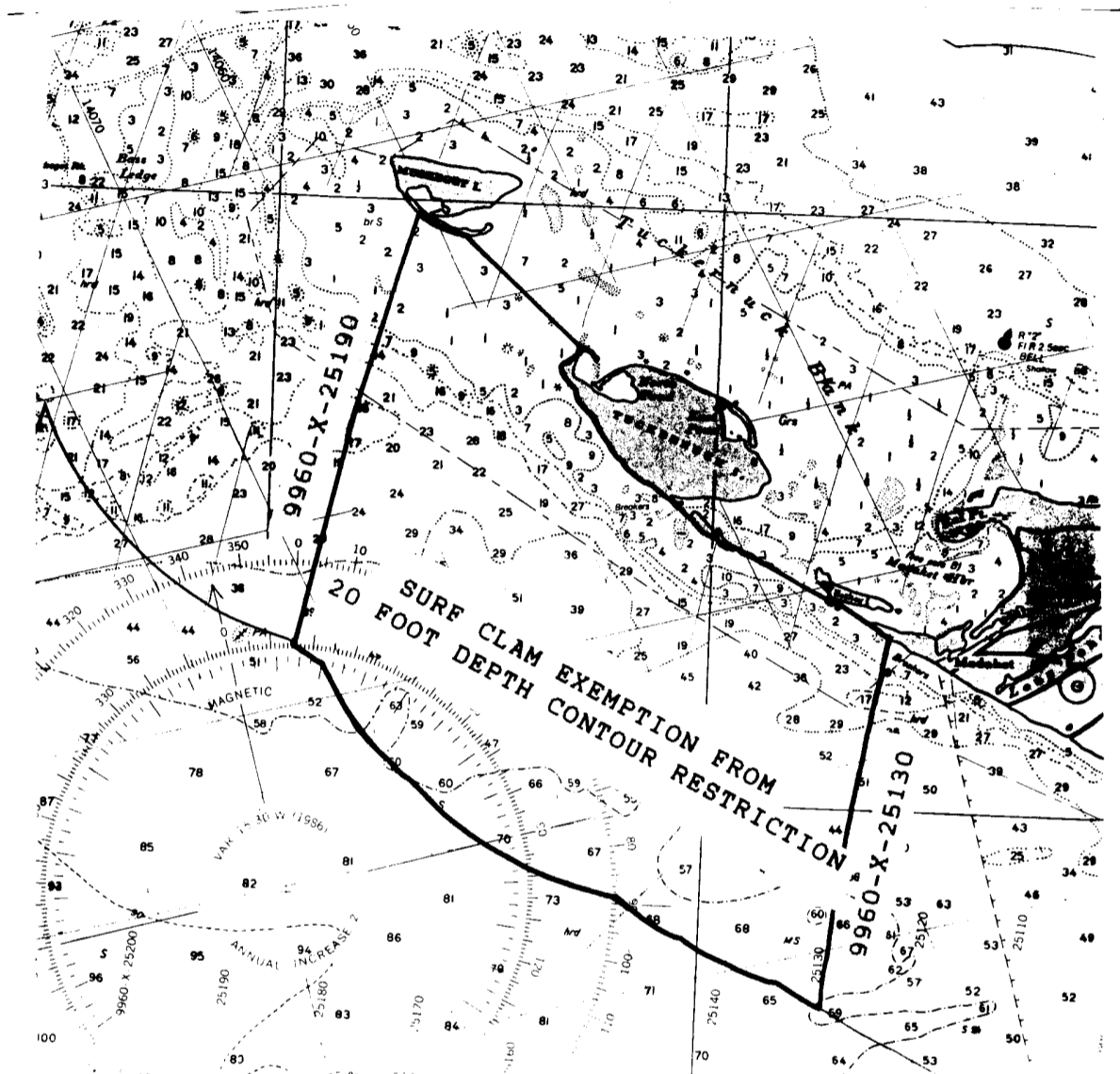
(k) Dredging for surf clams or ocean quahogs is prohibited from May 15<sup>th</sup> through October 15<sup>th</sup> within an area beginning at Manomet Point in Plymouth, at 41° 55' latitude and 70° 32.2' longitude; thence heading due east for 2.5 miles along the 41° 55' parallel to where it intersects with 70° 29' longitude; thence due south along the 70° 29' meridian to where it intersects with the shoreline in the town of Sandwich; thence following the shoreline back to the initial point.

(l) Commercial surf clam or ocean quahog fishing areas may be opened or closed for management purposes by the director provided that:

1. a majority of the Marine Fisheries Advisory Commission approves the action;
2. a notice of opening or closure is sent to the Secretary of State for publication in the *Massachusetts Register*;
3. surf clam regulated fishery permit holders are notified by mail;
4. the notice includes the rationale for the opening or closure; and
5. during the effective date of any closure, the Director shall consider any written comments on the closure which may be submitted to the Director by the public or a state or federal agency. Based upon these written comments, the Director may alter, amend or rescind the closure pursuant to the procedural requirements of 322 CMR 6.08(2)(l).

6.08: continued

CHART 322 CMR 6.08(2)



(3) Surf clam restrictions. The following restrictions shall apply to vessels dredging for surf clams in waters under the jurisdiction of the Commonwealth.

(a) Surf Clam Trip Limits.

1. It is unlawful for any vessel to catch or harvest greater than 200 bushels of surf clams per 24 hour day.
2. It is unlawful for any vessel to catch, harvest, possess, have on board, land or offload greater than 400 bushels of surf clams per 48 hour period, or at any time while fishing or having fished in waters under the jurisdiction of the Commonwealth during any trip.
3. Vessels properly licensed to do so may land surf clams legally taken outside the territorial waters of the Commonwealth in excess of the trip limit established by 322 CMR 6.08(3)(a) provided that no vessel engaged in fishing for surf clams within territorial waters may possess or have on board more than the prescribed limit.

## 6.08: continued

(b) Surf Clam Gear Restrictions.

1. It shall be unlawful for any vessel to operate with any hydraulic dredge with an effective fishing width greater than 48 inches.
2. It shall be unlawful for any vessel to operate more than one dredge while harvesting surf clams.
3. It shall be unlawful for any vessel to dredge for surf clams in those waters of the Town of Chatham designated in 322 CMR 6.08(2)(j), unless equipped with a hydraulic dredge with a 16" or less effective fishing width and powered by a three-inch or smaller pump with 300 GPM or less capacity at a ten-foot head (according to manufacturer's specifications).

(c) Surf Clam Minimum Size. It is unlawful for any vessel or person to take, possess, have onboard, land or off-load any surf clams which are less than five inches in the longest shell diameter to the amount of more than 5% of any batch, unless authorized by a permit issued by the Director.

1. Exemption for Federal Permit Holders. Commercial fishermen in possession of a federal surf clam permit may possess and land surf clams that do not comply 322 CMR 6.08(3)(c), provided said surf clams are caught lawfully in federal waters and gear is stowed when transiting state waters in possession of nonconforming surf clams.
2. Exemption for Dealers. Dealers may obtain, possess and process surf clams that do not comply with 322 CMR 6.08(3)(c). However, all batches of surf clams must have been lawfully taken from federal waters or from the waters under the jurisdiction of another state. All containers of surf clams must retain their original shellfish harvest tags and the origin of all containers of surf clams must be determinable through a federal trip report or bill of lading.
3. Exemption for Aquaculture Reared Product. No aquaculturist or his or her licensed employee shall possess for commercial purposes or sell aquaculture reared surf clams less than 1½ inches in longest diameter. In addition to the shellfish tagging requirements at 322 CMR 16.03: *Tagging of Shellfish*, all aquaculturists or their licensed employees shall include the statement "Aquaculture Reared" or "Farm Raised" on all shellfish tags that are affixed to containers that hold aquaculture reared quahogs or oysters that do not conform to the minimum sizes at 322 CMR 6.08(3)(c).

(4) Ocean Quahog Restrictions.(a) Ocean Quahog Trip Limits.

1. It shall be unlawful for any vessel to catch, harvest, possess, or land greater than eight cages (256 bushels) of ocean quahogs during any 24-hour period.
2. Vessels properly licensed to do so may possess and land ocean quahogs legally taken from waters outside the jurisdiction of the Commonwealth in excess of the trip limit established by 322 CMR 6.08(4)(a)1., provided that no vessel engaged in fishing for ocean quahogs within the waters under the jurisdiction of the Commonwealth may possess more than the prescribed limit.

(b) Ocean Quahog Gear Restrictions.

1. It is unlawful for any vessel to operate with any hydraulic dredge with an effective fishing width greater than 48 inches.
2. It is unlawful for any vessel to operate more than one dredge while harvesting ocean quahogs.
3. It is unlawful for any vessel rigged for the harvest of ocean quahogs to possess or have onboard surf clams.

(5) General Restrictions. The following restrictions apply to vessels fishing for surf clams or ocean quahogs.(a) Permitting Requirements. A regulated fishery permit endorsement, issued by the Director pursuant to 322 CMR 7.01(4)(a): *Regulated Fishery*, is required to dredge for surf clams and ocean quahogs.(b) Incidental Catch. The possession of bay scallops (*Argopecten irradians*) and or quahogs (*Mercenaria mercenaria*) is prohibited by vessels using hydraulic dredges for surf clams or ocean quahogs for any period longer than required to remove said quahogs and bay scallops from the dredge or deck and return them to the waters, unless said vessel is properly licensed by the town in whose waters the vessel is fishing to harvest and retain said species.

## 6.08: continued

(6) Prohibitions.

(a) It is unlawful to fish for surf clams or ocean quahogs in any area designated as contaminated and classified as PROHIBITED by the Division of Marine Fisheries pursuant to M.G.L. c. 130, §§ 74 or 74A, unless specifically authorized by the Director in accordance with 322 CMR 6.08(10).

(b) It is unlawful to fish for surf clams or ocean quahogs in any area closed for management purposes pursuant to 322 CMR 6.08(2)(g).

(c) It is unlawful to fish for surf clams or ocean quahogs in any area not classified as "APPROVED" according to the National Shellfish Sanitation Program.

(7) Fishing in Contaminated Areas. The following conditions apply to the harvest of surf clams for bait purposes from contaminated areas classified as PROHIBITED by the Division.

(a) Permits. A regulated fishery permit endorsement issued by the Director pursuant to 322 CMR 7.01(4)(a): *Regulated Fishery Permit Endorsement* is required to fish in contaminated areas for surf clams.

(b) Tagging and Labeling. All bags and containers used for contaminated surf clams shall be tagged or labeled on the vessel, before landing, with a waterproof red tag or label bearing the following information: CONTAMINATED SHELLFISH - FOR BAIT PURPOSES ONLY - Permit #----(area).

(c) Gear Restrictions. Dredges used for the harvest of contaminated surf clams shall conform to specifications established by 322 CMR 6.08(3)(b)3. All pumps shall be equipped with mufflers adequate to prevent excessive noise. All other methods of harvest must be approved in writing by the Division.

(d) Hours of Operation. No person may fish for contaminated surf clams except during daylight hours from sunrise to sunset at Boston, Massachusetts.

(e) Landing Restrictions. All shellfish harvested from specified contaminated areas shall be landed at a location to be named on the permit, and distributed according to conditions listed on the permit. Any transportation of contaminated surf clams shall be by a method and route approved by the Division in writing.

(f) Landing Limits. No person authorized under this 322 CMR 6.08(7) to fish for contaminated surf clams may harvest, possess or offload more than 50 bushels of shellstock or 100 gallons of shucked clams during any 24 hour day.

(g) Reporting Requirements. All persons authorized under 322 CMR 6.08(7) shall follow the reporting requirements established by 322 CMR 6.08(5)(a), except that a daily record of sales shall be kept and produced upon demand for inspection by any person authorized to enforce 322 CMR 6.08.

(h) Management Areas. Persons authorized under 322 CMR 6.08(7) to fish for contaminated surf clams in specific areas are exempt from the provisions of 322 CMR 6.08(2).

(i) Permit Restrictions. No person authorized to fish for contaminated surf clams under 322 CMR 6.08(7) may hold a Shellfish Transaction Card issued pursuant to 322 CMR 7.01(2)(k): *Shellfish Transaction Card*.

## (6.09: Regulation of Catches: Reserved)

6.10: Management of the Asiatic Freshwater Clam (*Corbicula Fluminea*)

(1) Purpose. Any importation, transportation, or possession of *Corbicula fluminea*, into or within the geographic boundaries of the Commonwealth of Massachusetts, is deemed to be injurious or potentially injurious to the maintenance, preservation, and/or protection of the marine fisheries resources of the Commonwealth. 322 CMR 6.10 is promulgated to manage the importation, transportation, and possession of *Corbicula fluminea* into or within Massachusetts so as to minimize the possibility of any such injury.

(2) Definitions. For the purposes of 322 CMR 6.10 the following words shall have the following meanings:

*Corbicula Fluminea* means that species of shellfish commonly known as the Asiatic freshwater clam.

6.10: continued

(e) Transportation means to ship, convey, carry or transport by any means whatever, and deliver or receive for such shipment, conveyance, carriage or transportation.

(3) General Restrictions. The importation, possession, and/or transportation by any person of *Corbicula fluminea* into or within the geographical boundaries or jurisdiction of the Commonwealth of Massachusetts is prohibited.

(4) Penalties. Violation of any provision of 322 CMR 6.10 shall be subject to the penalties set forth in M.G.L. c. 130, §§ 2, 9 and 12.

6.11: Bay Scallops Harvest Criteria

(1) Definitions.

Bay Scallop means that species of marine mollusk known as *Argopecten irradians*.

Shell Height means a straight line measurement from the middle of the hinge to the opposing valve margin.

Seed Scallop means scallops that are sexually immature and do not bear a well-defined raised annual growth line.

(2) Prohibition on Harvest and Possession of Seed Scallops. No person shall land or possess scallops without a well-defined raised annual growth line and that growth line shall measure at least ten millimeters from the hinge of the shell.

Exception. Bay Scallops that have a well-defined raised annual growth line located less than ten millimeters (mm) from the hinge of the shell, shall be lawful to harvest and possess if the shell height is at least 63.5 millimeters or 2.5 inches.

6.12: Fish Pot Fishery Restrictions

(1) Definitions. For the purposes of 322 CMR 6.12 the following words shall have the following meanings.

Black Sea Bass means that species offish known as *Centropristes striata*.

Black Sea Bass Pot means any pot or trap that has six sides and at least two unobstructed escape vents or openings in the parlor section that are at least 2½ inches in diameter, two inches square, or 1% inch by 5% inch, and is set on the bottom of the ocean and designed to capture black sea bass.

Black Sea Bass Pot Regulated Fishery Permit Endorsement means those limited entry regulated fishery permit endorsements, issued and managed pursuant to M.G.L. c. 130, §§ 2 and 80 and 322 CMR 7.01(4)(a): *Regulated Fishery* and 7.06: *Transfer of Limited Entry Permits*, that authorize a named individual to use black sea bass pots for the taking of black sea bass for commercial purposes.

Coastal Commercial Lobster Permit means the commercial fisherman permit, issued and managed pursuant to M.G.L. c. 130, §§ 37 and 38 and 322 CMR 7.01(2): *Commercial Fisherman Permits* and 7.03: *Coastal Lobster Permit and Trap Allocation Transfer Programs*, that authorizes a named individual to: fish for, possess and land lobsters and finfish taken from the waters under the jurisdiction of the Commonwealth for commercial purposes.

Commercial Fisherman means any person fishing under the authority of a permit issued in accordance with M.G.L. c. 130, § 38 or 80 and 322 CMR 7.01(2): *Commercial Fisherman Permits* for the purpose of sale, barter or exchange, or to keep for personal or familial use any fish or shellfish taken under the authority of the commercial fisherman permit.

Conch Pot means any pot or trap, without side heads or horizontal laths and is set on the bottom of the ocean and designed to capture whelks.

6.20: Quahogs, Soft Shelled Clams and Oysters

(1) Definitions.

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*.

Batch means all shellfish in each separate container.

Commercial Purposes means the possession of any oyster, quahog or soft shelled clam by a commercial fisherman or aquaculturist for primary purchase by a dealer acting as a primary buyer.

Container means any bag, box, basket, cage, tote or other receptacle containing loose shellfish or fish which may be separated from the entire load or shipment.

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.

Hinge Width means the distance between the convex apex of the right shell and the convex apex of the left shell.

Market Size means any oyster, quahog or soft shelled clam that is at least the minimum size prescribed at 322 CMR 6.20(2) and may be harvested, possessed or sold for commercial purposes.

Oyster means that species of mollusk known as *Crassostrea virginica*.

Quahog or Hard Clam means that genus of mollusk known as *Mercenaria sp.*

Razor Clam means that species of mollusk known as *Ensis directus*.

Seed means any oyster, quahog or soft shelled clam that is less than the minimum size prescribed at 322 CMR 6.20(2).

Soft Shelled Clam means that species of mollusk known as *Mya arenaria*.

(2) Minimum Sizes.

(a) Quahogs. No person shall take or have in possession quahogs less than one inch shell thickness (hinge width).

(b) Soft Shelled Clams. No person shall take or have in possession soft shelled clams less than two inches in longest diameter.

(c) Oysters. No person shall take or have in possession oysters less than three inches in longest diameter.

(d) Exemptions for Aquaculture Reared Oysters and Quahogs Aquaculture Reared Minimum Sizes.

1. Quahogs. No aquaculturist or his or her licensed employee shall possess for commercial purposes or sell aquaculture reared quahogs less than  $\frac{7}{8}$  inch shell thickness (hinge width).

2. Oysters. No aquaculturist or his or her licensed employee thereof shall possess for commercial purposes or sell aquaculture reared oysters less than  $2\frac{1}{2}$  inches in longest diameter.

3. In addition to the shellfish tagging requirements at 322 CMR 16.03: *Tagging of Shellfish*, all aquaculturists or their licensed employees shall include the statement "Aquaculture Reared" or "Farm Raised" on all shellfish tags that are affixed to containers that hold either quahogs or oysters that are aquaculture reared and do not conform to the minimum sizes at 322 CMR 6.20(a) and (c).

(e) Tolerance. All minimum sizes at 322 CMR 6.20(2) shall be subjected to a tolerance where the possession of undersized quahogs, soft shelled clams and oysters shall not exceed 5% of the count of any batch.

6.20: continued

(3) Transplanting Seed or Adult Oysters.

(a) It shall be unlawful for a person to plant, transplant, or introduce for the purpose of transplanting seed or adult oysters into any waters or into any designated shellfish growing areas within the Commonwealth without first obtaining a special permit issued by the Director in accordance with 322 CMR 7.01(4)(c): *Special Project*.

(b) Any oysters planted, transplanted or introduced in violation of 322 CMR 6.20(3) shall be confiscated and destroyed.

(c) Any violation of the provisions of 322 CMR 6.20(3) is punishable by a fine of not less than \$10.00 and not more than \$1,000 or by imprisonment for a month.

(4) Use of Bleach or Bleach Solutions to Harvest Razor Clams or Soft Shelled Clams. It shall be unlawful for any recreational or commercial fisherman to possess or use bleach or bleach solutions while fishing for razor clams or soft shelled clams.

6.21: Whelk Conservation and Management

(1) Definitions. For the purpose of 322 CMR 6.21, the following terms shall have the following meanings:

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

Chute Gauge means an open top rectangular gauge made of rigid material.

Commercial Fisherman means any person fishing under the authority of a permit issued in accordance with M.G.L. c. 130, § 80, and 322 CMR 7.01(2): *Commercial Fisherman Permits* for the purpose of sale, barter or exchange, or to keep for personal or family use any fish or shellfish caught under the authority of the commercial fisherman permit.

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

Operculum is the lid that closes the aperture of the shell when the animal is retracted.

Recreational Fishing means the noncommercial taking or attempted taking of knobbed or channeled whelks for personal or family use, which are not to be sold, bartered or exchanged.

Shell Width means the diameter of the shell measured across its greatest width perpendicular to the long axis of the shell.

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

Trip means that period of time that begins when a fishing vessel departs from a dock, berth, beach, seawall, ramp or port to carry out commercial fishing operations and that terminates with a return to a dock, berth seawall, ramp or port.

(2) Commerical Possession of Legal Sized Knobbed and Channeled Whelks.

(a) Purpose. To increase spawning stock biomass of knobbed and channeled whelks, the legal harvest size limit for these species will be gradually increased to correspond to a size where 50% of female knobbed and channeled whelks are sexually mature. The asymmetry of these animals and the propensity for their siphonal canals to break during handling limits the effectiveness of managing harvest with a traditional shell width or shell length minimum size standards. Consequently, legal sized knobbed and channeled whelks shall be determined through the use of a chute gauge meeting the specifications and by applying the methodology in 322 CMR 6.21(2)(b) and (c).

6.34: continued

(9) Minimum Size. It is unlawful to possess a horseshoe crab for commercial purposes with a prosomal width of less than seven inches.

(10) Asian Horseshoe Crab Prohibition. It shall be unlawful to import, transport, purchase, possess, offer for sale or release into state waters Asian horseshoe crab species.

6.35: Spiny Dogfish Management

(1) Definitions. For the purposes of 322 CMR 6.35:

Fin or Finning means the act of taking a spiny dogfish and removing the fins.

Night means the time between ½ hour after sunset to ½ hour before sunrise during the period March 1<sup>st</sup> through October 31<sup>st</sup> or from 6:00 P.M. to 6:00 A.M. during the period November 1<sup>st</sup> through the last day of February.

Spiny Dogfish means that species of fish known as *Squalus acanthias*.

Spiny Dogfish Commercial Quota means the allowable annual commercial harvest of spiny dogfish, as specified by the Atlantic States Marine Fisheries Commission under the authority of the interstate and federal management plans.

(2) Permit. A regulated fishery permit endorsement, issued by the Director pursuant to 322 CMR 7.01(4)(a): *Regulated Fishery Permit Endorsement* shall be required of all commercial fishermen taking or landing spiny dogfish in accordance with 322 CMR 6.35.

(3) Dealer Authorization. It is unlawful for dealers, without written authorization from the Director, to purchase spiny dogfish from commercial fishermen.

(4) Dealer Reporting. Dealers shall report all purchases of spiny dogfish by phone and in writing based on schedules established and on forms to be provided by the Division.

(5) Possession Limit. It shall be unlawful for commercial fishermen to possess or land more than 6,000 pounds of spiny dogfish during any trip or calendar day, whichever period of time is longer. To the extent that it is required by the Atlantic States Marine Fisheries Commission or the National Marine Fisheries Service, the Director may adjust the manner and times of taking spiny dogfish, the legal size of spiny dogfish to be taken, and the quantities of spiny dogfish to be taken in accordance with the authority and procedure set forth at 322 CMR 6.41(2) to make commercial fishery limit adjustments for quota managed species.

(6) Commercial Quota. It is unlawful for commercial fishermen to land or possess spiny dogfish when the Director projects that 100% of the Commonwealth's spiny dogfish commercial quota is taken and the fishery is closed through a Declaration of Closure, issued in accordance with 322 CMR 6.41(2).

(7) Prohibitions. It is unlawful for any person while at sea to fin a spiny dogfish or to possess spiny dogfish fins.

6.36: Quahog Dredge Management in State Waters

(1) Definitions.

Batch means all shellfish in each separate container.

Bushel means a standard 32 quart (volume) container.

Dredge means any variety of towed devices which utilize blades, knives or teeth to dig into the substrate and remove shellfish, including the hydraulic dredge which utilizes pumped water to enhance fishing performance.

## 6.36: continued

Effective Fishing Width means the width of the sea bottom from which the dredge collects shellfish, including the width of the blades and carriers, bars, wires, suction heads or similar structures or openings, including any water jet area, which affect the swath or overall width of the path from which the shellfish are taken.

Hinge Width means the distance between the convex apex of the right shell and the convex apex of the left shell, also known as shell thickness.

Quahog means the hard clam or bay quahog (*Mercenaria mercenaria*), including its various subspecies.

State Waters, for purposes of 322 CMR 6.36, means those waters between the outer jurisdiction of the coastal cities and towns to regulate shellfish pursuant to M.G.L. c. 130, § 52, as appearing on official maps of the Commonwealth prepared pursuant to M.G.L. c. 1, § 3 and the outer fisheries jurisdiction of the Commonwealth (Territorial Sea), including all of Nantucket Sound outside town jurisdiction and west of 70.00° longitude.

(2) Permit. No person may dredge for quahogs in state waters as defined in 322 CMR 6.36(1)(g), unless in possession of a bay quahog dredge regulated fishery permit endorsement, issued by the Director pursuant to 322 CMR 7.01(4)(a): *Regulated Fishery Permit Endorsement*. The quahog dredging endorsement is not necessary if dredging in city or town waters pursuant to a local shellfish permit.

(3) Quahog Trip Limits. It is unlawful for any person or vessel fishing in state waters to harvest, possess or land more than 40 bushels of quahogs per 24-hour day. No quahog dredging is authorized at night pursuant to 322 CMR 8.03: *Night Closure to Mobile Gear Fishing*.

(4) Sorting. The catch shall be sorted in the area of harvest, and seed quahogs (less than one inch hinge width) amounting to more than 5% of the catch by count shall be released in the area of harvest. It shall be unlawful to release legal-sized quahogs to change the size composition of the catch. All legal-sized quahogs must be landed in one bushel containers, tagged pursuant to 105 CMR 533.005: *Adoption of the National Shellfish Sanitation Program Model Ordinance*, and counted as part of the daily limit.

(5) Quahog Gear Restrictions. It shall be unlawful for any person or vessel to dredge for quahogs in state waters using more than one dredge or a dredge with an effective fishing width greater than 48 inches.

(6) Reporting Requirements.

(a) Any person to whom a quahog dredge endorsement is issued must provide the Director with an accurate monthly record of the following:

1. Areas fished;
2. Times fished; and
3. Daily record of quahogs harvested by bushel.

(b) Forms for such reporting may be obtained from the Director.

(c) Failure to supply the Director with an accurate statistical report within five days following the end of the reporting period specified on the form or falsification of any form supplied by the Director shall result in the suspension of the quahog dredge endorsement.

6.37: Coastal Shark Conservation and Management

(1) Purpose. 322 CMR 6.37 seeks to ensure coordinated state and federal management towards establishing healthy self sustaining populations of Atlantic coastal sharks. Coastal shark conservation and management is interstate and state federal in nature; effective assessment and management can be enhanced through cooperative efforts with all Atlantic state and federal scientists and fisheries managers. 322 CMR 6.37 creates two groups of sharks: Permitted Species that are allowed to be harvested, and Prohibited Species that are protected and may not be harvested unless specifically authorized by the Director or NOAA Fisheries.

## 6.37: continued

(e) Authorization to Possess Prohibited Species. The Director may authorize persons to land and possess certain Prohibited Species for research or other scientific purposes. Commercial fishermen who possess authorization from NOAA Fisheries to harvest certain species from federal waters may possess on board, or land those species in Massachusetts provided said fish were taken lawfully from federal waters.

(f) Dealer Measures. All dealers purchasing Atlantic Coastal Shark species from commercial fishermen must obtain a federal Commercial Shark Dealer Permit from the National Marine Fisheries Service.

6.38: Shellfish Landing Restrictions Necessitated by Marine Biotoxins

(1) Purpose and Scope. To protect public health, welfare, and safety, the Director may determine through studies and reports regarding concentration levels of toxic phytoplankton and associated biotoxin levels in certain shellfish species that the harvest of certain species should be restricted. In addition to closures enacted within waters under the jurisdiction of the Commonwealth under authority of M.G.L. c. 130, §§ 74A and 75, the Director may restrict the taking of certain shellfish species and the landing of those products by any vessel registered under the laws of the Commonwealth from areas determined to contain levels of toxic phytoplankton, including waters within the Exclusive Economic Zone, that may place the public health at risk from consumption of shellfish products.

(2) Emergency Closure Areas. The Director shall determine areas where the taking of certain shellfish species and shellfish products and/or the landing of such species and product is prohibited to protect public health.

(3) Prohibited Species and Products. The Director shall determine those species and products for which it shall be prohibited to harvest and/or possess for commercial or recreational purposes within the Commonwealth.

(4) Procedure. These closures and landing prohibitions shall apply to any vessel registered under the laws of the Commonwealth provided that:

- (a) a notice has been filed with the *Massachusetts Register*;
- (b) a copy of the notice has been emailed *via* the Division's email listserve and notice posted on the Division's website; and
- (c) said notice contains the rationale for the closure.

After the effective date of the closure the Director shall consider any written comments on the closure from the public or state or federal agency. Based on these comments the Director may alter, amend or rescind the closure pursuant to the procedural requirements of 322 CMR 6.38.

6.39: Loligo Squid Management

(1) Season. It is unlawful for any commercial fisherman to land or possess *Loligo* squid using small-mesh otter trawls as specified in 322 CMR 8.07: *Mesh Size Restrictions* from June 10<sup>th</sup> through April 22<sup>nd</sup>, unless the period when trawlers are allowed to use small-mesh nets to fish for squid is amended by the Director.

(2) Possession Limits. It is unlawful for commercial fishermen using mobile gear to land or possess greater than 2,500 pounds of *Loligo* squid per vessel per 24-hour day when:

- (a) NOAA Fisheries has announced that the federal incidental trip limit is in effect;
- (b) the Director has filed a notice with the *Massachusetts Register*; and
- (c) the Director has sent notice *via* the Division's email listserve and posted notice on the Division's website.

(3) Commercial Fishery Limit Adjustments. The director may adjust *Loligo* squid commercial fishery landing/possession limits to correspond to limits established by NOAA Fisheries.

322 CMR 7.00: PERMITS

Section

- 7.01: Form, Use and Contents of Permits
- 7.02: Master and Subordinate Digger Permits
- 7.03: Coastal Lobster Permit and Trap Allocation Transfer Programs
- 7.04: Commercial Fisheries Control Date
- 7.05: Coastal Access Permit (CAP)
- 7.06: Limited Entry Permits
- 7.07: Dealers Acting as Primary Buyers
- 7.08: Offshore Lobster Permit Control Date, Moratorium, and Transfers
- 7.09: Further Regulation of Permits (Reserved)
- 7.10: Recreational Saltwater Fishing Permits

7.01: Form, Use and Contents of Permits

(1) Definitions. For purposes of 322 CMR 7.01, unless the context requires otherwise, the following words shall have the following meanings:

At-sea Processing means to receive or transfer fish, fillet fish or shuck shellfish and/or freeze fish or shellfish. At-sea processing does not include the filleting of finfish for personal use as authorized pursuant to 322 CMR 6.41(2)(a): *Possession of Fish Parts by Commercial Fishermen*; the evisceration of finfish, including the removal of codfish gonads and monkfish livers; the separating of monkfish tails from whole monkfish; and the shucking of bay scallops and sea scallops under the authority of a regulated fishery permit endorsement.

Bait means marine organisms including, but not limited to, fish, shellfish and seaworms exclusively used to attract and harvest other fish and shellfish.

Commercial Fishing means to take or harvest any fish or shellfish for purposes of sale, barter or exchange, or to keep for personal or family use any fish or shellfish taken under the authority of a commercial permit issued by the Director.

Commercial Purposes means the possession or attempted possession of any fish or shellfish in connection with any person, business or other undertaking intended for sale, barter, exchange or other forms of profit, excluding for-hire recreational fishing businesses permitted in accordance with 322 CMR 7.10(5).

Director means the Director of the Division of Marine Fisheries.

Harvest means to catch, dig, take or attempt to catch, dig or take any fish, shellfish or bait.

Land or Landing as used in 322 CMR 7.00, and in M.G.L. c. 130, § 80, means to transfer or attempt to transfer the catch of fish or shellfish from any vessel to any other vessel or onto any land, pier, wharf, dock or other artificial structure, or for a fishing vessel with any fish onboard to tie-up to any dock, pier or other artificial structure.

Mobile Device means any electronic device that can be carried on one's person, such as a smartphone, which is capable of displaying a true, complete and legible image of a current and valid permit issued by the Division.

Mobile Gear means any movable fishing gear or nets which are set, towed, hauled, or dragged through the water for the harvest of fish, squid, and shellfish including, but not limited to, otter trawls, beam trawls, bottom and mid-water pair trawls, Scottish seines, Danish seines, pair seines, purse seines, and sea scallop dredges. For the purpose of this section, mobile gear does not include surf clam and ocean quahog dredges, bay quahog dredges or the use of moveable fishing gear by shellfish fishermen authorized under a local permit to take shellfish and are fishing only within those city or town waters.

Non-commercial means the harvest of fish, shellfish or bait for purposes of personal use only and not for purposes of sale, barter or exchange.

## 7.01: continued

Online System means the online recreational permitting system of the Department of Fish and Game and the Division of Marine Fisheries, accessible via the Department's and the Division's website, which allows for the automated issuance of recreational saltwater and non-commercial lobster fishing permits. The purchase online of a recreational saltwater or non-commercial lobster permit requires an electronic signature made after an online affirmation under the pains and penalties of perjury by the applicant that the information provided is true and accurate and that the applicant shall comply with all applicable marine fisheries regulations.

Possession or to Possess means to have custody or control of, or to handle or hold.

Recreational Fishing means the non-commercial taking or attempted taking of finfish for personal or family use, sport or pleasure which are not sold, traded or bartered.

Registered Length means that length set forth in either the U.S. Coast Guard or Massachusetts Boat and Recreational Vehicle Safety Bureau, whichever is applicable.

Shellfish means clams, conchs, limpets, mussels, oysters, periwinkles, quahogs, razor clams, bay scallops, sea scallops, surf clams, ocean quahogs and winkles.

Vessel means any commercial fishing vessel, boat, ship or other water craft registered under the laws of the Commonwealth (state) as defined in M.G.L. c. 130, § 1, and which is used exclusively to harvest fish or shellfish for purposes of sale, barter or exchange, and shall include any vessel documented under the laws of the United States to carry passengers for hire exclusively to harvest fish or shellfish.

(2) Commercial Fisherman Permits. In order to harvest, possess or land fish, shellfish or bait for commercial purposes, the following permits are required for the following fishing activities:

(a) Coastal Lobster. Issued to a named individual in accordance with 322 CMR 7.01 authorizing the possession and landing of lobster and fish for commercial purposes from waters within the jurisdiction and authority of the Commonwealth in accordance with M.G.L. c. 130, § 38B and 322 CMR 7.01. This permit may be endorsed for the harvest, possession and landing of shellfish and seaworms for commercial purposes. The permit shall include a restriction that memorializes the permit holders declaration of the ASMFC Lobster Management Areas the permit holder will fish during a calendar year. If the permit authorizes fishing in more than one area, the permit shall be subject to the most restrictive ASMFC lobster management regulations governing the permitted fishing area, as set forth in 322 CMR 6.02(2): *Maximum and Minimum Sizes* and (5): *V-notched Female Lobster Protection*.

(b) Offshore Lobster. Authorizes the possession and landing of lobsters harvested from waters outside the jurisdiction of the Commonwealth using a vessel registered under the laws of the state and validly endorsed for FCZ fishing. This permit shall be further endorsed for gear type to enhance management, reporting, and enforcement of gear-specific trip limits by requiring a non-trap endorsement for those permit holders fishing with non-trap gear; permits fished with trap gear will be the default category and not require a distinct endorsement. Offshore lobster permit holders or users may not also hold, use or have on board an individual non-commercial or family non-commercial lobster permit. The permit shall include a restriction that memorializes the permit holders declaration of the ASMFC Lobster Management Areas the permit holder will fish during a calendar year. If the permit authorizes fishing in more than one area, the permit shall be subject to the most restrictive ASMFC lobster management regulations governing the permitted fishing area, as set forth in 322 CMR 6.02(2): *Maximum and Minimum Sizes* and (5): *V-notched Female Lobster Protection*.

(c) Boat 100 Feet or Greater. Authorizes the harvest, possession and landing of fish for commercial purposes using a vessel 100 feet registered length or greater. Said permits shall authorize the crew of said vessel to fish under its authority and may be endorsed upon request of the applicant for the harvest, possession and landing of shellfish and seaworms for commercial purposes.

(d) Boat 60 to 99 Feet. Authorizes the harvest, possession and landing of fish for commercial purposes using a vessel from 60 to 99 feet registered length. Said permit shall authorize the crew of the vessel to fish under its authority and may be endorsed upon request of the applicant for the harvest, possession and landing of shellfish and seaworms for commercial purposes.

## 7.01: continued

(e) Boat 0 to 59 Feet. Authorizes the harvest, possession and landing of fish for commercial purposes using a vessel from 0 to 59 feet registered length. Said permit shall authorize the crew of said vessel to fish under its authority and may be endorsed upon request of the applicant for the harvest, possession and landing of shellfish and seaworms for commercial purposes.

(f) Seasonal Lobster. Authorizes only the named individual to harvest, possess and land lobsters for commercial purposes, to be issued only to full-time students 12 years of age or older and conditioned to authorize the harvest, possession and landing of lobsters for commercial purposes only from June 15<sup>th</sup> to September 15<sup>th</sup> of each year and further conditioned to the use of not more than 25 lobster pots.

(g) Shellfish and Seaworms. Authorizes only the named individual to harvest, possess and land shellfish and seaworms for commercial purposes, and may be endorsed for the shucking of bay scallops.

(h) Individual. Authorizes only the named individual to harvest, possess and land fish for commercial purposes. Said permit may be endorsed upon request of the applicant for the harvest, possession and landing of shellfish and seaworms for commercial purposes.

(i) Shellfish/Rod and Reel. Authorizes the harvest, possession and landing of shellfish for commercial purposes and/or the harvest, possession or landing of fish by means of a rod and reel for commercial purposes subject to 322 CMR 7.01(10).

(j) Rod and Reel. Authorizes only the named individual to harvest, possess and land for commercial purposes by means of a rod and reel.

(k) Shellfish Transaction Card. Authorizes only the named individual holding a commercial fishermen permit endorsed for shellfish and seaworms to sell shellfish and seaworms, and shall be used in conjunction with either a Massachusetts driver's license or a Registry of Motor Vehicles identification card.

(3) Dealer Permits. The following categories of permits may be issued by the Director and are required for the following activities:

(a) Wholesale Dealer. Authorizes the wholesale possession, distribution, processing, sale or resale of raw fish and shellfish. Said permit includes authorization for the retail sale and retail resale of fish and shellfish from a fixed location approved in writing by the Massachusetts Department of Public Health.

(b) Wholesale Broker. Authorizes the wholesale brokering, directing the transport of or any commercial transaction in the sale of raw or processed fish or shellfish.

(c) Wholesale Truck. Authorizes the wholesale possession or distribution of raw or processed fish and shellfish for commercial purposes from a vehicle approved in writing by the Massachusetts Department of Public Health.

Exception: Commercial Lobster Permit holders, who also hold a Retail Boat Permit as defined in 322 CMR 7.01(3)(f), shall be exempt from the requirements to obtain this wholesale truck dealer's permit when transporting only live lobsters and live crabs for commercial sale.

(d) Retail Dealer. Authorizes the retail sale of raw fish and shellfish from a fixed location approved in writing by the Massachusetts Department of Public Health.

(e) Retail Truck. Authorizes the retail sale of raw fish from a vehicle approved in writing by a local or county Board of Health.

(f) Retail Boat. Authorizes a fisherman with a Massachusetts commercial fishing permit to sell from a boat to the general public, product he lawfully harvested, including the sale of live lobsters and whole raw fish from a boat. For holders of any commercial lobster permit, the authorization granted under this retail boat dealer's permit shall also include the transport of live lobsters or live crabs, caught aboard the holder's permitted vessel, for sale to the public including to persons and businesses that are not retail or wholesale dealers of raw or processed fish or shellfish.

(g) Retail Farmer's Market. Authorizes the retail sale of certain raw fish and fish products at a farmer's market subject to written approval by the Department of Public Health, or the municipal or county board of health.

(h) Bait Dealer. Authorizes the possession and sale of bait.

(4) Special Permits. The following special permits may be issued by the Director for the following activities:

## 7.01: continued

(a) Regulated Fishery Permit Endorsement. In accordance with M.G.L. c. 130, §§ 2 and 80, regulated fishery permit endorsements may be added to commercial fisherman permits, issued pursuant to 322 CMR 7.01(2), to authorize the named individual and/or commercial fishing vessel to harvest, possess or land fish or shellfish or use certain fishing gear in a fishery regulated pursuant to M.G.L. c. 130, § 17A.

1. Open Access Regulated Fishery Permit Endorsements. The following regulated fishery permit endorsements may be added to commercial fisherman permits, issued in accordance with 322 CMR 7.01(2), and shall be required:

- a. American Eel. For a named individual and/or vessel to commercially fish for American eels within the waters under the jurisdiction of the Commonwealth, or to harvest, possess or land American eels for commercial purposes in the Commonwealth.
- b. Bay Scallop Shucking. For a named individual to shuck bay scallops onshore for commercial or non-commercial purposes.
- c. Coastal Access Permit - Purse Seine. A Coastal Access - Purse Seine may be issued for the use of purse seines waters under the jurisdiction of the Commonwealth, excepting the waters within the Inshore Net Areas described at 322 CMR 4.02.
- d. Contaminated Surf Clam. For a named individual and/or vessel to operate a surf clam dredge in shellfish growing area designated by the Division as "PROHIBITED" and to harvest, possess or land surf clams taken from a shellfish growing area designated by the Division "PROHIBITED" for the purpose of being kept or sold as bait.
- e. Fish Weir. To operate a fish weir in the waters under the jurisdiction of the Commonwealth or to harvest, possess or land fish or shellfish taken by a fish weir in the Commonwealth.
- f. Inshore Net Permit. To operate net gear within the inshore net areas described at 322 CMR 4.02: *Use of Nets in Inshore Restricted Waters*. This regulated fishery permit endorsement is not required for the use of a bait net that measures less than 250 square feet.
- g. Northern Shrimp. For a named individual and/or vessel to commercially fish for Northern shrimp within the waters under the jurisdiction of the Commonwealth, or to harvest, possess or land northern shrimp for commercial purposes in the Commonwealth.
- h. Sea Herring. For a named individual and/or vessel to commercially fish for Atlantic sea herring within the waters under the jurisdiction of the Commonwealth, or harvest, possess or land Atlantic sea herring for commercial purposes in the Commonwealth.
- i. Sea Scallop Diving. For a named individual to commercially fish for sea scallops by hand within the waters under the jurisdiction of the Commonwealth, or to harvest, possess or land sea scallops for commercial purposes that were taken by hand in the Commonwealth.
- j. Sea Scallop Shucking. For a named individual and/or vessel to shuck sea scallops at-sea for commercial or non-commercial purposes.
- k. Sea Urchin Diving. For a named individual to commercially fish for sea urchins by hand within the waters under the jurisdiction of the Commonwealth, or to harvest, possess or land sea urchins for commercial purposes that were taken by hand in the Commonwealth.
- l. Sea Urchin Dredge. For a named individual to operate a sea urchin dredge in the waters under the jurisdiction of the Commonwealth or to harvest, possess or land any sea urchins taken by a sea urchin dredge from the waters under the jurisdiction of the Commonwealth.
- m. Scup. For a named individual and/or vessel to commercially fish for scup within the waters under the jurisdiction of the Commonwealth or harvest, possess or land scup for commercial purposes in the Commonwealth.
- n. Spiny Dogfish. For a named individual and/or vessel to commercially fish for spiny dogfish within the waters under the jurisdiction of the Commonwealth, or to harvest, possess or land spiny dogfish for commercial purposes in the Commonwealth.
- o. Striped Bass. For a named individual and/or vessel to commercially fish for striped bass within the waters under the jurisdiction of the Commonwealth or to harvest, possess or land striped bass for commercial purposes in the Commonwealth.

## 7.01: continued

- p. Surface Gillnet. For a named individual and/or vessel to set or fish a gillnet - anchored, drifting or otherwise - that is designed to be, capable of being or is fished in the upper two-thirds of the water column. This regulated fishery permit endorsement is not required for the use of a surface gillnet that measures less than 250 square feet. A named individual and/or vessel that holds a sink gillnet regulated fishery permit endorsement shall not also hold a surface gillnet regulated fishery permit endorsement to fish surface gillnets that exceed 250 square feet.
2. Limited Entry Regulated Fishery Permit Endorsements. Commercial fisherman permits, issued in accordance with 322 CMR 7.01(2), may be endorsed with the following regulated fishery permit endorsements. Pursuant to the authority at M.G.L. c. 130, § 2, the following regulated fishery permit endorsements are limited entry and may only be renewed and transferred subject to the provisions set forth at 322 CMR 7.06. These regulated fishery permit endorsements are required for the following:
- a. Black Sea Bass. For a named individual and/or vessel to commercially fish for black sea bass within the waters under the jurisdiction of the Commonwealth, or to harvest, possess or land any black sea bass for commercial purposes in the Commonwealth.
  - b. Bluefin Tuna Seine. For a named individual and/or vessel to set or fish for tuna by means of purse seine within the waters under the jurisdiction of the Commonwealth.
  - c. Bluefish Gillnet. For a named individual and/or vessel to set or fish for bluefish by means of a gillnet, in accordance with 322 CMR 6.18(3): *Use of Gillnets for Taking Bluefish for Commercial Purposes*, within the waters under the jurisdiction of the Commonwealth.
  - d. Coastal Access Permit. For a named individual and/or vessel to set or fish with mobile gear within the waters of the jurisdiction of the Commonwealth. Coastal Access Permits may be further endorsed for participation in exempted fisheries authorized at 322 CMR 4.06: *Use of Mobile Gear*:
    - i. Small Mesh Trawl Fishery for Whiting. A Coastal Access regulated fishery permit endorsement may be further endorsed for the use and possession of small mesh trawls to commercially fish for whiting within certain waters under the jurisdiction of the Commonwealth.
    - ii. Small Mesh Trawl Fishery for Longfin Squid. A Coastal Access regulated fishery permit endorsement may be further endorsed for the use and possession of small mesh trawls to commercially fish for squid within certain waters under the jurisdiction of the Commonwealth.
    - iii. North Shore Mobile Gear. A Coastal Access regulated fishery permit endorsement may be further endorsed to fish with mobile gear within the Area 5 and Area 6 exemptions to the North Shore Year Round Mobile Gear Closure.
  - e. Fish Pots. For a named individual to set or fish species-specific fish pots for black sea bass, scup or whelks within the waters under the jurisdiction of the Commonwealth, or to possess, take or land black sea bass, scup or whelks by fish pot for commercial purposes in the Commonwealth. A black sea bass or scup pot regulated fishery permit endorsement holder shall be required to also hold a black sea bass or scup regulated fishery permit endorsement to harvest, possess or land black sea bass and scup for commercial purposes in the Commonwealth.
  - f. Fluke. For a named individual and/or vessel to commercially fish for summer flounder (fluke) within the waters under the jurisdiction of the Commonwealth, or to harvest, possess or land any summer flounder for commercial purposes in the Commonwealth.
  - g. Horseshoe Crab Harvest. For a named individual and/or vessel to commercially fish for horseshoe crabs in the waters under the jurisdiction of the Commonwealth or land horseshoe crabs for commercial purposes in the Commonwealth.
  - h. Menhaden. For a named individual and vessel to commercially fish for menhaden within the waters under the jurisdiction of the Commonwealth, or to harvest, possess or land menhaden for commercial purposes in the Commonwealth in excess of 6,000 pounds of menhaden per trip or 24-hour period, whichever duration is longer.

## 7.01: continued

- i. Ocean Quahog and Surf Clam Dredge. For a named individual and/or a vessel to operate an ocean quahog and/or surf clam dredge or to commercially fish for, harvest, possess or land ocean quahogs or surf clams taken by ocean quahog and/or surf clam dredge gear from the waters under the jurisdiction of the Commonwealth.
  - j. Quahog Dredge. For a named individual and/or vessel to operate a bay quahog dredge or to commercially fish for, harvest, possess or land bay quahogs taken by bay quahog dredge gear from the waters under the jurisdiction of the Commonwealth seaward of the outer jurisdiction of coastal cities and towns to regulate shellfish pursuant to M.G.L. c. 130, § 52, as appearing on official maps of the Commonwealth prepared pursuant to M.G.L. c. 1 § 3.
  - k. Sink Gillnet. For a named individual or vessel to set or fish a gillnet - anchored or otherwise - that is designed to be, capable of being or is fished in the lower third of the water column in waters under the jurisdiction of the Commonwealth. Sink gillnet regulated fishery permit endorsements are not transferable. Holders of a sink gillnet regulated fishery permit may fish surface gillnets under the authority of this permit.
  - l. State-waters Groundfish. For a named individual or vessel to commercially fish for regulated groundfish, as defined at 322 CMR 6.03(1): *Definitions*, or to harvest, possess or land any regulated groundfish for commercial purposes taken from waters under the jurisdiction of the Commonwealth. A state-waters groundfish regulated fishery permit endorsement is not required for vessels that hold a federal multi-species groundfish or monkfish permit or for a commercial fisherman to harvest, possess and land up to 25 pounds of whole or eviscerated regulated groundfish for commercial purposes.
  - m. Tautog. For a named individual or vessel to commercially fish for tautog within the waters under the jurisdiction of the Commonwealth, or to harvest, possess or land any tautog for commercial purposes in the Commonwealth. Beginning in 2020, the issuance of these permits will be limited only to those commercial fisherman who held a regulated fishery permit endorsement for tautog in 2018 and 2019, and also sold at least 120 pounds of tautog to a Massachusetts primary buyer, permitted in accordance with 322 CMR 7.01(3) and 7.07, during any calendar year from 2010 through 2016, occurring prior to the August 27, 2017 control date set forth at 322 CMR 7.04(2).
- (b) Noncommercial Fishing Permits.
- 1. Recreational Saltwater Fishing Permits. Pursuant to M.G.L. c. 130, § 17C and 322 CMR 7.10, the Director may issue a recreational saltwater fishing permit to authorize:
    - a. recreational saltwater fishing; and
    - b. for-hire vessels.
  - 2. Noncommercial Lobster and Edible Crab. Pursuant to M.G.L. c. 130, § 38, the Director may issue a noncommercial lobster and edible crab permit to authorize:
    - a. Trap Fishing. Issued to a named individual authorizing the harvest, possession and landing of lobsters and edible crabs by means of traps for noncommercial purposes by that individual or by members of that individual's immediate family residing in the same household.
    - b. Diver Fishing. Issued to a named individual authorizing the harvest, possession and landing of lobsters by diving for noncommercial purposes by that individual only. A noncommercial lobster permit may not be carried onboard any vessel fishing under authority of an offshore lobster permit.
- (c) Special Project. Authorizes only the names individual to engage in a specified marine fishery project including, but not limited to, aquaculture or mariculture; scientific, environmental and biological collection and study, assessment or experimentation; collection and possession for education purposes; shellfish relay; and shellfish propagation.
- (d) Anadromous Fish Passageway. Authorizes the named individual to carry out activities related to the construction, reconstruction, repair, or alteration of any anadromous fish passageway, as defined in M.G.L. c. 130, §§ 1 and 19.

7.01: continued

(e) At-sea Processing. A special permit is required for the commercial at-sea processing of fish or shellfish in the waters under the jurisdiction of the Commonwealth. This permit is not required for the evisceration of finfish, including the removal of cod gonads and monkfish livers; the removal of monkfish tails from monkfish; the shucking of bay scallops and sea scallops under the authority of a bay scallop or sea scallop shucking regulated fishery permit endorsement; or to keep fish parts for personal use as authorized pursuant to 322 CMR 6.41(2)(a): *Possession of Fish Parts by Commercial Fishermen*.

(f) Special Biomedical Horseshoe Crab Harvest Permit. For a named individual to harvest horseshoe crabs exclusively for use by the biomedical industry for the manufacturing of limulus lysate or for sale to a permitted scientific institution for the purpose of research. The holder of a biomedical harvest permit shall not also hold a horseshoe crab harvest regulated fishery permit endorsement.

(5) Application. Applicants for a permit shall comply with the following requirements:

(a) Forms. Applications for a permit shall be on forms supplied by the Director. A separate application shall be made for each individual, boat, vessel, plant, firm, establishment, corporation, partnership or other business entity.

NON-TEXT PAGE

## 7.01: continued

(b) Information. An application for a permit required by M.G.L. c. 130 and 322 CMR 7.01 shall contain and include the following:

1. the name and address of the applicant;
2. the date of birth of the applicant;
3. the last four digits of either the applicant's social security number or federal identification number;
4. for applicants for a commercial fishermen permit endorsed for shellfish, the applicant's Massachusetts driver's license number or Registry of Motor Vehicles identification number;
5. the name of the commercial fishing vessel;
6. the required length of the fishing vessel;
7. the Massachusetts vessel registration number;
8. the homeport of the commercial fishing vessel; and
9. the true and accurate signature of the applicant;
10. any other information sufficient to fully identify the particular activity to be undertaken and the intended use for the permit.

(c) Conditions. The following permit applicants shall comply with the following conditions:

1. Master digger permit applicants shall submit with their application a valid bond as required by 322 CMR 7.02(2)(b);
2. Dealer permit applicants shall submit with their application an approved health inspection certificate validly issued by the Department of Public Health pursuant to a health inspection of the applicant's premises;
3. Seasonal lobster permit applicants shall submit an affidavit supplied by the Director signed under the pains and penalties of perjury attesting to their full-time student status; and
4. Shellfish and seaworm permit applicants shall, for a bay scallop endorsement, submit a certified sanitary inspection approved by the Massachusetts Department of Public Health.

(d) Multiple Applications. A separate application shall be made for each individual, boat, vessel, plant, firm, establishment, corporation, partnership or other business entity.

(e) Signature. Permit applicants shall comply with the following applicable signature requirements:

1. Applicants for recreational saltwater fishing permits and non-commercial lobster fishing permits issued in accordance with 322 CMR 7.01(4)(b) and 7.10 through the Online System shall electronically sign their permit after making an online affirmation under the pains and penalties of perjury that the information provided is true and accurate and that the applicant shall comply with all applicable marine fisheries regulations.
2. Applicants for all other permits issued to an individual in accordance with 322 CMR 7.01 shall sign their name on the paper application and the permit.
3. Except as otherwise provided at 322 CMR 7.01(5)(f), whenever a permit is issued to a boat, vessel or business entity, the permit may be signed by of the owner of the boat or vessel or by a duly authorized officer of the business entity that includes the true and correct business title of the duly authorized officer.

(f) Exception. Coastal lobster permits shall be issued to and renewed by a named individual only. The permit application and the permit itself shall be signed by a named individual who shall be the holder. In no event may a coastal lobster permit be issued to or renewed by a business entity or an officer of a business entity.

(g) Effect of Signature. The applicant's signature on either the paper application or their electronic signature through the Online System shall constitute:

1. a declaration under the pains and penalties of perjury that all information contained in the application is true and accurate to the best belief of the applicant;
2. a statement that the applicant and all individuals conducting the activity under authority of the permit have read and are familiar with all applicable statutes contained in M.G.L. c. 130, all applicable regulations contained in 322 CMR and agree to fully comply therewith; and
3. an agreement to display all fish in possession of the applicant and all individuals conducting the activity under authority of the permit to any officer authorized to enforce the marine fishery laws of the Commonwealth.

## 7.01: continued

(h) Fees. All fees required in accordance with M.G.L. c. 130, § 83 shall accompany each application in the form of checks or money orders made payable to the Commonwealth of Massachusetts. Cash may be used only when the application is made in person. In the event an applicant's personal check is not honored by the payor or bank, the permit issued to such applicant shall be void until such time as the required fee in the form of a bank check, certified check or postal money order is received by the Director. Any activity conducted by the applicant under the purported authority of said permit five or more days subsequent to the mailing to the applicant of a notice of the dishonored check shall constitute a violation of the applicable provisions of M.G.L. c. 130 and 322 CMR.

(6) Issuance. Permits shall not be validly issued or of full force and effect unless the following applicable requirements are met:

(a) Paper permits must:

1. identify the activity which is authorized or the privilege which is granted by the Director;
2. contain a financial transaction number;
3. contain a permit number;
4. contain the date of issuance;
5. contain a true and accurate copy of the Director's signature;
6. contain a true and accurate signature of the holder, or if a boat, vessel or business entity, the owner, master or duly authorized officer of the business entity including his or her business title.

(b) Recreational salt water fishing permits and non-commercial lobster permits issued through the Online System must be based on a completed form provided by the Director through the Online System and electronically signed in accordance with 322 CMR 7.01(5)(e).

(7) Conditions. The Director may at any time, in his discretion, attach any written conditions or restrictions to the permit deemed necessary or appropriate for purposes of conservation and management or to protect the public health, welfare and safety.

(8) Duplicates. Duplicate permits may be issued by the Director provided that a satisfactory affidavit signed under the pains and penalties of perjury is submitted by the person who signed the original application and permit attesting to the disposition of the original permit sought to be replaced.

(9) Suspension and Revocation. In accordance with M.G.L. c. 30A, §§ 10, 11 and 13, and pursuant to the procedural rules of 801 CMR 1.00: *Standard Adjudicatory Rules of Practice and Procedure*, any permit issued by the Director may be suspended or revoked for falsifying any application form, violation of any condition or restriction of the permit, or for violation of any provision of M.G.L. c. 130 or 322 CMR.

(10) Alteration. Any permit validly issued by the Director which is subsequently and substantially altered, erased or mutilated is invalid.

(11) Expiration. All permits validly issued shall expire on December 31<sup>st</sup> following the date of issuance unless otherwise provided by law, modified or extended by the Director in writing, or suspended or revoked by the Director or a court of competent jurisdiction.

(12) Transfer. Unless otherwise provided in writing by the Director, or in accordance with 322 CMR or M.G.L. c. 130, permits may not be transferred, loaned, leased, exchanged, bartered, sold or possessed by a person other than the holder, boat, vessel, or business entity to which it was issued.

(13) Requirement to Accommodate Sea Samplers. For the purpose of observing and acquiring information about fishing operations and sampling catches for biological information, all permit holders, as condition of their permit, shall agree to take on board and provide safe access for sea samplers authorized by the Division of Marine Fisheries at a location established by the Division.

7.01: continued

(14) Prohibitions. It is unlawful to:

- (a) conduct any marine fishery activity which is subject to a permit pursuant to M.G.L. c. 130 or 322 CMR without such permit or during a period of suspension or revocation of the permit, or five days after the mailing of a notice pursuant to 322 CMR 7.01(5)(d);
- (b) falsify any application form, documentation or letters of support in conjunction with any application form;
- (c) alter, erase, mutilate or falsify any permit issued by the Director;
- (d) violate or fail to comply with any permit condition or restriction;
- (e) transfer, loan, lease, exchange, barter or sell any permit or for any person other than the holder to possess a permit except as otherwise provided for in writing by the Director or in accordance with 322 CMR or M.G.L. c. 130;
- (f) violate any provision of M.G.L. c. 130 or 322 CMR when conducting an activity authorized by permit;
- (g) fail to produce a permit upon demand of any officer authorized to enforce the marine fishery laws of the Commonwealth, except that persons who have purchased a recreational saltwater fishing permit or non-commercial lobster permit through the Online System may produce their permit by displaying a true, complete and legible image of it on their mobile device;
- (h) fail to display fish harvested or possessed under authority of a permit to any officer authorized to enforce the marine fishery laws of the Commonwealth;
- (i) harass, threaten, intimidate, coerce or assault any officer authorized to enforce the marine fishery laws of the Commonwealth;
- (j) have more than one individual, boat, vessel or business entity fish or conduct business under authority of a permit, unless otherwise provided for in M.G.L. c. 130, 322 CMR or in writing by the Director;
- (k) sell or offer to sell any shellfish harvested under authority of a commercial fishermen permit endorsed for shellfish to any person without a valid Massachusetts shellfish transaction card and either a valid Massachusetts driver's license or a Registry of Motor Vehicles Identification card;
- (l) have a non-commercial lobster permit on board any vessel fishing under authority of an offshore lobster permit;
- (m) conduct any activity designed to construct, reconstruct, rebuild, repair, or alter any anadromous fish passageway as defined in M.G.L. c. 130, §§ 1 and 19, or to construct or build any new anadromous fish passageway without a special permit issued pursuant to 322 CMR 7.01(4).
- (n) to sell or offer to sell any regulated groundfish species as defined in 322 CMR 8.12(1): *Definitions* harvested by persons aboard vessels that are engaged in for-hire fishing.
- (o) obtain multiple State Waters Multispecies Groundfish Endorsements for the same vessel regardless of the number of commercial permits associated with said vessel.
- (p) obtain a State Waters Multispecies Groundfish Endorsement for a vessel authorized to take Multispecies Groundfish or monkfish under a federal permit.
- (q) obtain a State Waters Multispecies Groundfish Endorsement for a vessel authorized on or before January 1, 2006 to take Multispecies Groundfish or monkfish under a federal permit if that federal permit has been transferred, leased or sold on or after January 1, 2006;
- (r) any vessel to engage in the at-sea transfer of any fish or shellfish subject to possession limits established pursuant to 322 CMR 6.41: *Further Regulation of Catches*.
- (s) any vessel with an at-sea processing permit to process any fish or shellfish subject to minimum size limits established pursuant to 322 CMR.
- (t) any wholesale truck or retail dealer permit holder to accept raw shellfish from a commercial fisherman or to act as a primary buyer of shellfish.

7.02: Master and Subordinate Digger Permits

- (1) Definitions. For purposes of 322 CMR 7.02 only the following words shall have the following meanings:

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

Division means the Massachusetts Division of Marine Fisheries.

7.02: continued

DPH means the Massachusetts Department of Public Health.

Master Digger means any person authorized by the Director pursuant to 322 CMR 7.02 to engage in the harvest, possession and transportation of moderately contaminated shellfish.

Moderately Contaminated Shellfish means any shellfish from an area classified as "restricted" and suitable for the harvest of shellfish with purification.

Purification means the process of purifying moderately contaminated shellfish at the purification plant operated by the Division and located at Plum Island, Newburyport, Massachusetts.

Subordinate Digger means any person authorized by the Director pursuant to 322 CMR 7.02 to harvest and possess moderately contaminated shellfish for sale to a master digger only.

- (2) Master Digger Eligibility. An applicant for a master digger permit shall:
  - (a) be 18 years of age or older, and, except for renewals, shall present documented proof of birth date in person at the Division office in Boston;
  - (b) be bonded by a recognized insurance bonding company to assure full faith and compliance with 322 CMR 7.02 and 10.00: *Management of Moderately Contaminated Shellfish*, 105 CMR 500.020: *General Requirements*, 500.021: *Additional Requirements for Handlers of Shellfish*, and 515.000: *Action Levels for Poisonous or Deleterious Substances in Food*, M.G.L. c. 130, §§ 74, 75 and 80 and any other conditions or restrictions applicable to the master digger permit. Said bond shall be a surety bond in the sum of \$1,000.00 fully executed with an effective term coextensive with that of the master digger permit, generally from January 1<sup>st</sup> to December 31<sup>st</sup> of each year. Master diggers with one prior judicial or administrative conviction related to the above mentioned statutes and regulations shall be required to obtain a bond in the amount of \$2,500.00. Master diggers with two or more prior judicial or administrative sanctions shall be required to obtain a bond in the amount of \$5,000.00;
  - (c) submit a satisfactory annual DPH inspection certificate certifying that the transport vehicle used by the applicant fully complies with appropriate sanitary standards and requirements of the latest revision of part II of the National Shellfish Sanitation Program manual of operations pertaining to the interstate shipment of shellfish; and
  - (d) submit a signed statement on forms supplied by the Director that the applicant has read, is familiar with and agrees to fully comply with 322 CMR 7.02 and 10.00: *Management of Moderately Contaminated Shellfish*, 105 CMR 500.020: *General Requirements*, 500.021: *Additional Requirements for Handlers of Shellfish*, and 515.000: *Action Levels for Poisonous or Deleterious Substances in Food*, M.G.L. c. 130, §§ 74A, 75 and 80 and any other conditions or restrictions applicable to the master digger permit.
- (3) Subordinate Digger Eligibility. An applicant for a subordinate digger permit shall:
  - (a) be 18 years of age or older, and, except for renewals, shall present documented proof of birth date in person at the Division;
  - (b) submit a signed statement on forms supplied by the Director that the applicant has read, is familiar with and agrees to fully comply with 322 CMR 7.02 and 10.00: *Management of Moderately Contaminated Shellfish*, 105 CMR 515.000: *Action Levels for Poisonous or Deleterious Substances in Food*, 520.000: *Labeling*, 525.000: *Newburyport Shellfish Treatment Plant*, and 533.000: *Fish and Fishery Products*, M.G.L. c. 130, §§ 74, 74A, 75 and 80 and any other conditions or restrictions applicable to the subordinate digger permit.
- (4) Restrictions. A master or subordinate digger shall not harvest, possess, transport, or sell any shellfish from:
  - (a) an approved area, unless the master or subordinate digger permit is in the possession of a duly appointed shellfish constable in a city or town with shellfish management plan approval by the Director;
  - (b) an area classified as prohibited and closed to shellfishing by the Director;
  - (c) any other area which is not opened by the Director for moderately contaminated shellfishing and classified as restricted.

## 7.02: continued

(5) Conditions. Master and subordinate digger permits may be conditioned by the Director, at any time, to limit the days on which moderately contaminated shellfish may be harvested, the number of racks to be harvested by each digger, or any other condition necessary to limit the harvest of moderately contaminated shellfish to the capacity of the purification plant, or to insure proper maintenance of shellfish growing areas. Permit conditions shall be effective upon posting and five days after mailing to the master digger permit holders; except that permit conditions shall be effective upon verbal notification from any Division employee, environmental police officer, or shellfish constable when the Director determines that immediate action is necessary for the public health, welfare and safety.

(6) Enforcement Report. Alleged violations by a master digger or subordinate digger of 322 CMR 7.02 and 10.00: *Management of Moderately Contaminated Shellfish*, 105 CMR 500.020: *General Requirements*, 500.021: *Additional Requirements for Handlers of Shellfish*, and 515.000: *Action Levels for Poisonous or Deleterious Substances in Food*, M.G.L. c. 130, §§ 74, 74A, 75 and 80, or any other condition or restriction applicable to the permit shall be submitted to the Director in writing by any officer authorized to enforce the marine fishery laws of the Commonwealth, or charged to investigate alleged violations thereof.

(7) Permit Suspension. Upon receipt of a written enforcement report alleging violations by a master or subordinate digger, the master digger permit or subordinate digger permit shall be suspended. Such suspension shall not be effective until the master or subordinate digger is in receipt of:

- (a) the written enforcement report;
- (b) a notice of statutory permit suspension setting forth the grounds and authority for the suspension; and
- (c) an order to show cause establishing a date, time and location for an adjudicatory proceeding and informing the respondent of his or her right to request an expedited proceeding at an earlier date.

(8) Adjudicatory Proceeding. The Director, or his authorized designee, shall as expeditiously as possible conduct an adjudicatory proceeding to adjudicate the alleged violations contained in the enforcement report under authority of M.G.L. c. 130, § 80, and pursuant to M.G.L. c. 30A and the formal rules of adjudicatory practice and procedure appearing at 801 CMR 1.01: *Formal Rules*.

(9) Sanctions. Based on the record of the adjudicatory proceeding including the findings of fact, conclusions of law and the recommendation of the presiding officer as contained in the memorandum of final decision, the Director, if a violation of violations are found of 322 CMR 7.02 and 10.00: *Management of Moderately Contaminated Shellfish*, 105 CMR 500.020: *General Requirements*, 500.021: *Additional Requirements for Handlers of Shellfish*, and 515.000: *Action Levels for Poisonous or Deleterious Substances in Food*, M.G.L. c. 130, §§ 74, 74A, 75 and 80, or any other condition or restriction applicable to the master digger permit, may take the following administrative action:

- (a) For the first offense - a 30 day suspension of the master digger or subordinate digger permit.
- (b) For a second offense:
  - 1. a 60 day suspension of the master digger or subordinate digger permit; and
  - 2. in the case of a master digger, enforcing the terms and conditions of the bond through payment of the bond value or portion thereof by the master digger and, in the event of his or her default, by the insurance company as surety.
- (c) For a third offense:
  - 1. not less than a 90 day nor more than one year suspension of the master or subordinate digger permit; and
  - 2. in the case of a master digger, enforcing the terms and conditions of the bond through payment of the bond value or portion thereof by the master digger and, in the event of his or her default, by the insurance company as surety.
- (d) For a fourth offense:
  - 1. revocation of the master or subordinate digger permit;
  - 2. prohibiting for a period of time to be determined by the Director the issuance of a new mater digger or subordinate digger permit; and

## 7.02: continued

3. in the case of a master digger, enforcing the terms and conditions of the bond through payment of the bond value or portion thereof by the master digger and, in the event of his or her default, by the insurance company as surety.

(10) Administrative Action. The Director may take additional administrative action necessary for the public health, welfare and safety whenever an enforcement report is submitted to him an an order to show cause is issued by him including, but not limited to:

- (a) establishing a temporary moratorium on the approval and issuance of any new master digger or subordinate digger permits to any applicant pending the outcome of the scheduled adjudicatory proceeding;
- (b) disapproval of the nomination by any master digger or a new supervisor or transportation agent pending the outcome of the adjudicatory proceeding; and
- (c) disapproval of the use by any master digger of the shellfish transportation vehicle used by the master digger who is the subject of the adjudicatory proceeding pending the outcome of said proceeding.

7.03: Coastal Lobster Permit and Trap Allocation Transfer Programs

(1) Purpose and Scope. The purpose of 322 CMR 7.03 is to regulate the number of lobster traps on a regional and individual basis to prevent over-fishing within each Lobster Conservation Management Area (LCMA) managed by the Commonwealth through the ASMFC, and to establish a process to enable the transfer of existing commercial lobster permits and traps pursuant to M.G.L. c. 130, § 38B, and St. 1992, c. 369.

The American lobster fishery is the state's most economically important fishery conducted within the territorial waters. To meet conservation goals of the interstate plan specific to the nearshore waters around eastern Cape Cod and Southern New England, the Outer Cape Cod Lobster Conservation Management Area (OCCLCMA) and Lobster Conservation Management Area 2 (LCMA 2) were developed, respectively. 322 CMR 7.03 details the effort control plans for the OCCLCMA and LCMA 2 comprised of trap limit programs and transfer programs as well as transfer regulations for the remainder of the coastal lobster fishery conducted in LCMA 1.

The transfer program for the coastal lobster fishery conducted in LCMA 1 allows permit holders to transfer their permits along with lobster related business assets under the historical transfer criteria developed for the coastal lobster fishery. Beginning in 2004, the only permit transfers allowed between LCMA's are those involving the transfer of a permit to an LCMA under management of an effort control plan. This will enable commercial fishermen to retain the maximum flexibility in the conduct of their businesses while ensuring conservation goals of any area-specific effort control plans are not comprised by increases in traps fished.

(2) Definitions. For the purposes of 322 CMR 7.03, the following words shall have the following meanings.

Actively Fished means landing and selling at least 1,000 lbs. of lobster or landing and selling lobster on at least 20 occasions, in a single year.

Allocation Transferee means the holder of a commercial lobster permit to whom a transfer of trap allocation is made.

Permit Holder means a holder of a coastal commercial lobster permit endorsed for either LCMA's 1, 2 or OCC.

Permit Transferee means the person to whom a commercial lobster permit is transferred who must document that he or she has at least one year of full-time or equivalent part-time experience in the commercial lobster trap fishery or two years of full-time or equivalent part-time experience in other commercial fisheries, according to criteria developed by the Division.

Transfer Trap Debit means the area-specific percentage of each allocation transfer transaction retained by the Division for conservation purposes as defined by the Division and subject to criteria developed by the Division, and not restricted by the Director under his authority to condition permits.

## 322 CMR: DIVISION OF MARINE FISHERIES

### 322 CMR 10.00: MANAGEMENT OF MODERATELY CONTAMINATED SHELLFISH

#### Section

- 10.01: Definitions
- 10.02: Authorization
- 10.03: Agents
- 10.04: Containers
- 10.05: Transportation
- 10.06: Hold-over
- 10.07: Records
- 10.08: Purification
- 10.09: Shellfish Release
- 10.10: Prohibitions
- 10.11: Penalties

#### 10.01: Definitions

For purposes of 322 CMR 10.00 only, the following words shall have the following meanings:

Approved Area as used by the Division when classifying or reclassifying a shellfish growing area in accordance with M.G.L. c. 130, § 74 or 74A means that shellfish may be grown or harvested for direct marketing.

Dig or Take (in all of its tenses) means to harvest, dig, take, remove or attempt to harvest, dig, take or remove any moderately contaminated shellfish by any method or means.

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

Division means the Massachusetts Division of Marine Fisheries.

DPH means the Massachusetts Department of Public Health, Division of Food and Drugs.

Landing Site means an area or areas designated by the Director as that location where moderately contaminated shellfish shall be deposited immediately after harvesting and from which the loading of said contaminated shellfish onto a transport vehicle shall take place.

Master Digger means any individual authorized by the Director pursuant to 322 CMR 7.02: *Master and Subordinate Digger Permits* to engage in the harvest, possession, transportation and sale of moderately contaminate shellfish.

Moderately Contaminated Shellfish means moderately contaminated shellfish harvested from an area which has been classified by the Division as "restricted" and has been opened by the Division for harvesting by master and subordinate diggers conditioned upon the purification of said shellfish at the shellfish purification plant.

Prohibited as used by the Division when classifying or reclassifying a shellfish area in accordance with M.G.L. c. 130, §§ 74 or 74A means the prohibition of any digging or taking of shellfish from the area so classified.

Purification Plant, or Depuration Plant, means the shellfish purification plant operated by the Division located at Plum Island, Newburyport, Massachusetts.

Rack means a ½ bushel container which may be filled pursuant to 322 CMR 10.04 with moderately contaminated shellfish harvested by each subordinate digger on a given day as a condition of the permit.

10.01: continued

Subordinate Digger means any individual authorized by the Director pursuant to 322 CMR 7.02 to harvest and possess at a landing site moderately contaminated shellfish for purposes of sale to a master digger only.

Transport Vehicle means any motor vehicle equipped with a separate, fully enclosed mechanically refrigerated cargo area not accessible from the cab, approved by DPH as complying with the transporting requirements of the National Shellfish Sanitation Program, marked in accordance with DPH regulations and authorized by the Director. No more than one such vehicle may be approved, authorized and used by a master digger for purposes of transporting moderately contaminated shellfish. Exception: mechanical refrigeration will not be required prior to July 1, 1989.

10.02: Authorization

(1) Permits. Any person authorized by 322 CMR 7.02 as a master digger or subordinate digger conducting activities under said authorization may not at the same time have in their possession a bait permit, a commercial fisherman permit endorsed for shellfish, or a shellfish transaction card unless it is validated for use by a master digger for the sale of purified shellfish. In no instance will a permit to harvest contaminated shellfish from a prohibited area be issued by the Director.

(2) Areas. Any person authorized as a master or subordinate digger may harvest moderately contaminated shellfish only from an area or areas classified as restricted and opened for such harvest by written notice of the Director, and if applicable, opened by local officials in accordance with M.G.L. c. 130, § 52.

(3) Supervision. The master digger, or his approved supervisor or transportation agent, shall at all times be present and supervise the harvesting, loading and transportation of all moderately contaminated shellfish taken under authority of a master or subordinate digger permit. As a condition to the master digger permit the master digger:

- (a) shall be responsible, accountable and liable for all of the shellfish activities of his or her supervisor, transportation agents, and subordinate diggers;
- (b) shall maintain an accurate list of subordinate diggers authorized to harvest moderately contaminated shellfish on each day in which harvesting activities take place, except that this requirement shall not apply to the master digger if the duly authorized supervisor maintains the list;
- (c) shall not authorize subordinate diggers to dig or take any moderately contaminated shellfish until such time as their true and accurate name and subordinate digger number is entered upon such list, and the area from which harvesting will take place is described to him or her by the master digger;
- (d) shall remain informed of the status of each area from which moderately contaminated shellfish is harvested under authority of the master digger permit;
- (e) shall receive and accept all regular and certified mail sent to him or her by the Division; and
- (f) agrees as a condition to the master digger permit to fully accept the provisions of 322 CMR 10.08(6) and 10.09.

10.03: Agents

(1) Supervisors. A master digger may employ no more than three persons who may also be subordinate diggers to act as supervisors provided that;

- (a) the individual is designated as a supervisor on forms supplied by the Director;
- (b) the individual designated as a supervisor on such forms is approved in writing by the Director;
- (c) the approved supervisor shall be authorized to and responsible for supervising the digging and taking, placement at a landing site, and loading onto a transport vehicle of all moderately contaminated shellfish harvested under authority of a master or subordinate digger permit;

10.03: continued

- (d) the approved supervisor signs a statement certifying his or her knowledge of and agreement to fully comply with 322 CMR 7.02: *Master and Subordinate Digger Permits* and 10.00, applicable regulations of DPH, M.G.L. c. 130, §§ 74, 74A, 75 and 80 and any applicable condition or restriction of the master digger permit; and
- (e) the approved supervisor carries on his or her person during moderately contaminated shellfishing activities his or her approved authorization form as required by 322 CMR 7.02(1)(b) and shall display said authorization on request of any officer authorized to enforce 322 CMR 7.02: *Master and Subordinate Digger Permits* and 10.00.

(2) Transportation Agents. A master digger may employ no more than two persons, who may also be subordinate diggers, to act as transportation agents. An approved transportation agent shall be considered an approved supervisor if responsible for supervising the harvesting and landing of moderately contaminated shellfish. Applicants for a transportation agent:

- (a) shall be designated as transportation agents on forms supplied by the Director;
- (b) shall have such designated forms approved in writing by the Director;
- (c) shall be authorized to and responsible for the transportation of moderately contaminated shellfish from its loading onto the transport vehicle to its off-loading at the purification plant;
- (d) shall sign a statement certifying his or her knowledge of and agreement to fully comply with 322 CMR 7.02: *Master and Subordinate Digger Permits* and 10.00, applicable regulations of DPH, M.G.L. c. 130, §§ 74, 74A, 75 and 80, and applicable conditions or restrictions of the master and subordinate digger permits; and
- (e) shall carry on his or her person during transporting activities his or her approved authorization form as required by 322 CMR 7.02(2): *Master Digger Eligibility* and shall display said authorization on request of any officer authorized to enforce 322 CMR 10.00.

(3) Prohibitions. It is unlawful for a supervisor or transportation agent to:

- (a) sell or offer to sell any moderately contaminated shellfish;
- (b) possess or transport any shellfish from an approved area while in possession of a master or subordinate digger permit or supervisor or transportation agent authorization form;
- (c) possess or transport any moderately contaminated shellfish from an area closed by the Director or from an area not otherwise classified as restricted by the Director.

(4) Plan. Cities and towns may develop alternate harvesting measures for approved and moderately contaminated shellfish areas by submitting a plan to the Director. The plan shall ensure that permits for such activities may not be possessed by a master digger or subordinate digger at the same time. Shellfish transaction cards and commercial fisherman permits shall be turned in to an authorized official during harvesting activities in moderately contaminated areas. Master and subordinate digger permits shall be turned in during harvesting activities in approved areas.

10.04: Containers

(1) Racks. Immediately upon harvesting, and for the purpose of loading onto a transport vehicle, all moderately contaminated shellfish shall be deposited in a rack that has been approved for such use in writing by DPH.

(2) Filing. Said rack shall be filled level with the bottom of the handles with no more nor less than ½ bushel of moderately contaminated shellfish, except the one rack from each day's harvest may contain less than the prescribed amount.

(3) Contents. Each rack may not contain any dead or broken shellfish or any foreign matter.

(4) Washing. All moderately contaminated shellfish in each rack shall be thoroughly washed prior to its loading onto the transport vehicle with water from the harvest area.

(5) Condition. All racks shall be kept in good repair.

10.04: continued

- (6) Protrusions. Racks with protruding wires or staples may not be used.

10.05: Transportation

- (1) Loading. Except as provided for in 322 CMR 10.06 all moderately contaminated shellfish harvested under authority of a master or subordinate digger permit shall be loaded onto a transport vehicle only at an approved landing site designated by the Director.
- (2) Identification. Moderately contaminated shellfish shall be accurately recorded in the master digger book and physically separated in the transport vehicle by designated area where harvested.
- (3) Route. Moderately contaminated shellfish shall be transported in the following manner.
- (a) immediately upon loading and with no delays to the purification plant;
  - (b) only in the master digger's approved transport vehicle; and
  - (c) via the approved route or routes designated and authorized by the Director.

10.06: Hold-over

- (1) Moderately contaminated shellfish may be held-over for delivery to the purification plant in the case of a demonstrated emergency notwithstanding 322 CMR 10.05 provided that such hold-over has been approved in advance by an environmental police officer or a duly appointed and authorized shellfish constable, and provided further that said officer or constable notifies the Division of Law Enforcement through its radio room of such approval.

10.07: Records

- (1) Books. Master diggers shall maintain complete and accurate records of their moderately contaminated shellfishing activities written in ink, in books supplied by the Director.
- (2) Entries. The master digger shall accurately record in such books, in triplicate, by date:
- (a) the amount of moderately contaminated shellfish harvested;
  - (b) the location where the harvesting occurred; and
  - (c) all entries shall be made subsequent to the loading of moderately contaminated shellfish on the transport vehicle but prior to the moment at which the transport vehicle departs from the landing site.
- (3) Placement. Upon completing an accurate entry the record book shall be placed in a secure and clean part of the cargo area wherein the moderately contaminated shellfish is located.
- (4) Production. The record book shall be produced upon demand of any officer authorized to enforce the provisions of 322 CMR 10.00 including but not limited to environmental police officers, shellfish constables and employees of the Division and DPH.
- (5) Disposition. The record books shall be disposed of as follows:
- (a) the white sheet shall be removed only by an official of the Division at the purification plant upon proper verification and validation.
  - (b) the transparent sheet shall remain attached to and form a part of the book at all times; and
  - (c) the yellow sheet may be removed by a duly appointed shellfish constable in a city or town authorized by the Director to manage contaminated shellfish areas pursuant to M.G.L. c. 130, § 75.
- (6) Diggers. The master digger shall, on a daily basis, record the true and accurate name and permit number of each subordinate digger employed and the number of racks of moderately contaminated shellfish harvested by each. Said records shall be produced upon demand of any officer authorized to enforce 322 CMR 10.00 or the supervisor of the shellfish purification plant.

#### 10.08: Purification

- (1) Responsibility. The master digger shall be responsible for all moderately contaminated shellfish delivered to the purification plant.
- (2) Pick-up. The master digger shall pick up all of his or her purified shellfish within 24 hours after its purification. Unclaimed shellfish shall be disposed of at the discretion of the plant supervisor.
- (3) Records. Prior to departing with the purified shellfish, the master digger shall record the amount of all purified shellfish released to his or her custody, the date of release and the designated area from which the purified shellfish had been harvested.
- (4) Tags. Prior to departing with the purified shellfish, the master digger shall supply and place a tag in each rack of purified shellfish or attach a tag to each rack by means other than by staples. Said tag shall be durable, of water proof material and contain the following information:
  - (a) the name of the master digger;
  - (b) the permit number of the master digger;
  - (c) the date when the purified shellfish was originally harvested;
  - (d) the designated area from which the purified shellfish was harvested;
  - (e) a Division stamp affixed by an official of the purification plant.
- (5) Dealers. Any licensed wholesale dealer certified to deal in shellfish may pick up purified shellfish for the master digger at the purification plant, provided that all tagging requirements are met, and DPH shellfish traceability regulations have been fully complied with by the transporting dealer.
- (6) Liability. The master digger agrees that the purification plant supervisor may refuse to treat improperly washed or culled moderately contaminated shellfish, and may dispose of any moderately contaminated shellfish which in his or her opinion will adversely affect the purification process. The master digger further agrees that said actions shall be taken without liability of any kind, may not subject the Division or the plant supervisor to any civil action for damages and may not form the basis for a tort claim of any kind.

#### 10.09: Shellfish Release

If upon completion of the first 48 hour purification period the shellfish delivered does not meet the required purification standards as established by DPH, an additional purification period may be attempted. If upon completion of an additional 24 hour purification period the shellfish do not meet or exceed the purification standards as established by DPH, the shellfish may not be released to the master digger but shall instead be disposed of by the purification plant supervisor in the best interests of the Commonwealth. The Commonwealth, the Division and its officials and employees shall not be liable to the master digger for any claim of any kind arising out of the disposition of the shellfish.

#### 10.10: Prohibitions

In addition to any other prohibition contained in 322 CMR 10.00, it is unlawful:

- (1) to harvest, possess, transport, sell or offer to sell any moderately contaminated shellfish unless properly authorized as a master digger, supervisor, transportation agent or subordinate digger pursuant to 322 CMR 7.02: *Master and Subordinate Digger Permits*.
- (2) for a master or subordinate digger to have in possession during his or her moderately contaminated shellfish activities a clean shellfish permit, a shellfish endorsement on his or her commercial fishermen permit or a shellfish transaction card other than a special master digger transaction card.
- (3) for the holder of a master or subordinated digger permit to harvest, possess, transport, sell or offer to sell any shellfish from a prohibited area or from any area which are otherwise clean, open and classified as approved by the Division.

10.10: continued

- (4) for a master digger or duly approved supervisor not to maintain an accurate list of subordinate diggers authorized to harvest moderately contaminated shellfish each day in which harvesting activities take place;
- (5) for a supervisor or transportation agent not to carry on his or her person during moderately contaminated shellfishing activities his or her approved authorization form or to fail or refuse to display said form on request of any officer authorized to enforce 322 CMR 10.10;
- (6) for a master or subordinate digger to conduct any moderately contaminated shellfish harvesting activities from sunset to ½ hour before sunrise as established by the United States Weather Bureau;
- (7) for a master or subordinate digger to leave any moderately contaminated shellfish at any location other than a designated landing site, or at a landing site which is not supervised at all times by the master digger or an agent as provided for in 322 CMR 10.03;
- (8) for a master or subordinate digger, supervisor or transportation agent to load any moderately contaminated shellfish onto a transport vehicle at any time between hour after sunset to sunrise, as established by the United States Weather Bureau;
- (9) for a master digger or transportation agent to delay the transportation of moderately contaminated shellfish to the purification plant, unless authorized to hold-over pursuant to 322 CMR 10.06;
- (10) to hold-over any moderately contaminated shellfish without fully complying with 322 CMR 10.06;
- (11) for a master digger or transportation agent to transport any contaminated shellfish by any method or in any vehicle other than the transport vehicle authorized by the Director for use by the master digger;
- (12) for a master digger or transportation agent to transport any contaminated shellfish in anything other than containers or racks approved by the DPH;
- (13) for a master digger or a supervisor to fill any container or rack in a manner which is not level with the bottom of the handles with more or less than ½ bushel of moderately contaminated shellfish except as provided for in 322 CMR 10.04(1);
- (14) for a master digger or transportation agent to transport contaminated shellfish which has not been washed or which contains broken or dead shellfish;
- (15) for a master digger, transportation agent, supervisor or subordinate digger to wash or clean moderately contaminated shellfish in water from a prohibited or unclassified area;
- (16) to transport moderately contaminated shellfish without the master digger or transportation agent present;
- (17) to transport any moderately contaminated shellfish which is not accurately identified in writing and physically separated by designated area where harvested;
- (18) for a master digger or transportation agent to transport any moderately contaminated shellfish over any route or routes other than those routes designated and authorized by the Director;
- (19) to transport any moderately contaminated shellfish in a transport vehicle which contains any other shellfish, either shucked or in the shell, which did not originate from the areas designated on that day as evidenced by entries in the master digger book;

10.10: continued

- (20) to deposit the master digger book after an entry has been made prior to the transport of the moderately contaminated shellfish in any place other than a secure and clean part of the cargo area wherein the shellfish is located;
- (21) to falsify, forge or counterfeit the signature of an environmental police officer or a shellfish constable when the signature is required by 322 CMR 10.06(2);
- (22) to store moderately contaminated shellfish in accordance with an approved hold-over in an area which is not sanitary or secure, or which has a temperature less than 32°F or greater than 50°F or where other clean shellfish is stored.
- (23) for a master digger not to maintain complete and accurate records by a medium other than ink, or to falsify any such record, or to dispose of any pages in a master digger book in any manner other than that provided for in 322 CMR 10.07;
- (24) for a master digger or subordinate digger not to pick up regular mail or sign for certified mail of the Division which is addressed to the master or subordinate digger;
- (25) for a master digger to possess any purified shellfish after its release from the purification plant without properly affixing tags, or affixing tags which do not contain all of the requirements of 322 CMR 10.08(4);
- (26) to falsify, forge, counterfeit, alter or steal the Division stamp required by 322 CMR 10.08(4)(e);
- (27) for a master digger or subordinate digger to conduct any moderately contaminated shellfishing activities, to be present at the purification plant, or to be present at or near a restricted area during a suspension of his or her master digger or subordinate digger permit;
- (28) for any master digger of his or her agent to discuss or negotiate the sale of any shellfish at the purification plant;
- (29) for a subordinate digger to sell any moderately contaminated shellfish to any person other than a master digger;
- (30) for a subordinate digger to harvest moderately contaminated shellfish without the permission, authorization and supervision of a master digger or supervisor;
- (31) for any person to violate any condition or restriction of:
  - (a) the master digger permit;
  - (b) the subordinate digger permit;
  - (c) the supervisor's authorization form; or
  - (d) the transportation agent's authorization form;
- (32) for any master digger, supervisor or transportation agent to mix moderately contaminated shellfish with clean shellfish, whether shellstock or shucked, in the transportation vehicle.
- (33) for any person to refuse to pay the purification fee as established by the Executive Office of Administration and Finance, by check or money order, or to deliver shellfish to the purification plant before restitution is made for checks which have not been honored by the payor bank;
- (34) for any person to refuse to display for inspection upon demand of any authorized officer or Division personnel a master digger or subordinate digger permit, a supervisor or transportation agent's authorization form, or any moderately contaminated shellfish possessed at the time;
- (35) for any person to harass, threaten, intimidate, abuse or assault any environmental police officer, shellfish constable, or employee of the Division or DPH.

## 322 CMR: DIVISION OF MARINE FISHERIES

### 10.11: Penalties

A violation of any provision of 322 CMR 10.00 may result in:

- (1) a fine of not less than \$50 nor more than \$1,000;
- (2) the seizure and forfeiture of all shellfish unlawfully taken, possessed or sold;
- (3) the seizure and forfeiture of all shellfishing gear, equipment and the transport vehicle;
- (4) suspension or revocation of the master digger permit or subordinate digger permit in accordance with 322 CMR 7.02(b);
- (5) suspension or revocation of any agent authorization;
- (6) enforcing the terms and conditions of the applicable bond maintained pursuant to 322 CMR 7.02(2)(b); or
- (7) any combination of the above.

### REGULATORY AUTHORITY

322 CMR 10.00: M.G.L. c. 130, §§ 2, 17A, 75, 80 and 104.

14.02: continued

- (c) The name, address and permit number of the shipping dealer;
- (d) The name, address and permit number of the receiving dealer; and
- (e) The date the product was shipped.

(4) Non-conforming Product. A person may possess aquaculture raised finfish that do not conform to Massachusetts commercial fishing regulations at 322 CMR.

(5) Prohibitions. It shall be unlawful for any person to:

- (a) Market, promote, advertise or sell aquaculture raised finfish without identifying the products as being aquaculture raised; or
- (b) Transport, possess, sell or offer for sale any aquaculture raised finfish that is not tagged or labeled in accordance with 322 CMR 14.02.

14.03: Sale of Aquaculture Reared Shellfish That Do Not Conform to Wild Caught Minimum Sizes

(1) Definitions.

Aquaculture Reared Minimum Size. Those minimum sizes for aquaculture reared surf clams prescribed at 322 CMR 6.08(3)(c): *Surf Clam Minimum Size* and aquaculture reared quahogs and oysters and 322 CMR 6.20(2)(c): *Oysters*.

Aquaculturist. 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*.

Commercial Purposes. The possession of any oyster, quahog or soft shelled clam by a commercial fisherman or aquaculturist for primary purchase by a dealer acting as a primary buyer.

Dealer. Any person, business or entity that is permitted in accordance with 322 CMR 7.01(3): *Dealer Permits* to purchase and/or sell shellfish at a wholesale or retail level.

Oyster. That species of mollusk known as *Crassostrea virginica*.

Primary Buyer. 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 aquaculturist or their licensed employee.

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

Quahog or Hard Clam. That genus of mollusk known as *Mercenaria sp.*

Surf Clam. That species of mollusk known as *Arctica islandica*.

Wild Caught Minimum Size. Those minimum sizes for wild caught surf clams prescribed at 322 CMR 6.08(3)(c): *Surf Clam Minimum Size* and wild caught quahogs and oysters and 322 CMR 6.20(2)(a): *Quahogs* and (c): *Oysters*.

(2) Rules Affecting the Sale of Aquaculture Reared Oysters and Surf Clams That Do Not Conform to Wild Caught Minimum Sizes.

- (a) The primary purchase of aquaculture reared oysters and surf clams that do not conform to the wild caught minimum size for these species must be between the aquaculturist or their licensed employee and a primary buyer.
- (b) A primary buyer may only accept aquaculture reared oysters and surf clams from an aquaculturist that do not conform to the wild caught minimum sizes for these species if:

14.03: continued

1. The aquaculture reared oysters and surf clams conform to the aquaculture raised minimum size for these species; and
  2. Are held in containers with shellfish tags affixed, in accordance with 322 CMR 16.03: *Tagging of Shellfish*, that additionally include the statement "aquaculture reared" or "farm raised" on the shellfish tag, as required at 322 CMR 6.20(2)(d)3.
- (c) Dealers may receive, possess, offer for sale and sell lawfully harvested aquaculture reared oysters and surf clams that do not conform to Massachusetts' wild caught minimum size, provided:
1. The aquaculture reared oysters and surf clams conform to the aquaculture raised minimum size for these species.
  2. All containers with aquaculture raised oysters and surf clams that do not conform to the wild caught minimum size include the statement "aquaculture reared" or "farm raised" on the dealer shellfish tag, as required by 105 CMR 500.021: *Additional Requirements for Handlers of Shellfish*.
  3. All aquaculture reared oysters and surf clams from outside the Commonwealth that do not conform with Massachusetts' wild caught minimum sizes for these species that are being received by Massachusetts' dealers shall conform to the above provisions.
- (d) Consumers may purchase and possess aquaculture reared oysters and surf clams that do not conform to the wild caught minimum size, provided they were lawfully harvested and sold in accordance with 322 CMR 14.03.

(3) Rules Affecting the Sale of Aquaculture Reared Quahogs Do Not Conform to Wild Caught Minimum Sizes.

- (a) The primary purchase of aquaculture reared quahogs that do not conform to the wild caught minimum size for this species must be between the aquaculturist or their licensed employee and a primary buyer that is certified by the Department of Public Health for the transport and sale of shellfish outside of the Commonwealth.
- (b) A primary buyer may only accept aquaculture reared quahogs from an aquaculturist and/or their licensed employee that do not conform to the wild caught minimum size for this species if:
  1. The aquaculture reared quahogs conform to the aquaculture raised minimum size for this species; and
  2. Are held in containers with shellfish tags affixed, in accordance with 322 CMR 16.03: *Tagging of Shellfish*, that additionally include the statement "aquaculture reared" or "farm raised" on the shellfish tag, as required at 322 CMR 6.20(2)(d)3.
- (c) A primary buyer that receives aquaculture reared quahogs from an aquaculturist or their licensed employee that do not conform to the wild caught minimum size may only offer for sale or sell these quahogs to entities or persons outside of Massachusetts.

REGULATORY AUTHORITY

322 CMR 14.00: M.G.L. c. 130.

## 322 CMR: DIVISION OF MARINE FISHERIES

### 322 CMR 15.00: MANAGEMENT OF MARINE AQUACULTURE

#### Section

- 15.01: Purpose and Scope
- 15.02: Definitions
- 15.03: Authorization
- 15.04: Permits
- 15.05: Application
- 15.06: Site Review
- 15.07: Biological Controls
- 15.08: Operation
- 15.09: Monitoring
- 15.10: Non-indigenous Species

#### 15.01: Purpose and Scope

The purpose of 322 CMR 15.00 is to establish a procedural and legal framework for marine aquaculture, including the possession, propagation, culture, sale and disposition of living marine organisms. The scope of 322 CMR 15.00 is to regulate the possession, transport, and sale of marine organisms for purposes of aquaculture; to establish operational guidelines for aquaculture facilities; to establish aquaculture license categories and procedures; and to provide a code of conduct for responsible marine aquaculture in the territorial waters of Massachusetts. It is intended that 322 CMR 15.00 will facilitate the development of a viable marine aquaculture industry, while protecting wild populations of marine organisms and their natural habitat from degradation or introduction of invasive aquatic species, parasites or diseases.

#### 15.02: Definitions

Aquaculture means the farming of aquatic marine organisms including, but not limited to fish, mollusks, crustaceans, echinoderms and plants. Farming implies some sort of intervention in the rearing process to enhance production including, but not limited to controlled propagation, feeding, protection from predators, *etc.*

Area of Capture means within the same body of water, which is geographically separated from other embayments, estuaries, *etc.*

ASMFC means Atlantic States Marine Fisheries Commission.

Coastal Waters means all waters of the Commonwealth within the rise and fall of the tide and the marine limits of the jurisdiction of the Commonwealth, but not waters within or above any fishway or dam nor waters above any jurisdictional boundary legally established pursuant to M.G.L. c.130, § 5 in rivers and streams flowing into the sea.

Commercial Aquaculture means marine aquaculture to produce marine organisms intended for sale. Commercial aquaculture implies individual or corporate ownership of the stock being cultivated.

Cull means to remove dead or dying or unsuitable organisms from the culture system (*also*: the organism which is removed).

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

Division means the Division of Marine Fisheries.

Flow-through means a system that withdraws water from coastal waters or wells and discharges water to coastal waters.

ICES means International Council for the Exploration of the Sea.

15.02: continued

Invasive Species means a non-indigenous or cryptogenic marine organism that may threaten the diversity or abundance of native species or the ecological stability and/or uses of infested waters.

Minimal Structures means structures in the marine environment that do not require an Individual Permit, that is, which meet the threshold requirements of the Programmatic General Permit (PGP) issued by the U.S. Army Corps of Engineers.

Non-indigenous Species means any marine species transported intentionally or accidentally from another region (non-native species) as determined by the Division.

NPDES mean the National Pollution Discharge Elimination System, administered by the U.S. Environmental Protection Agency (EPA) and the MA Department of Environmental Protection (DEP).

Ornamental Species means organisms, including plants, raised for display in aquariums or other non-food purposes.

PGP means the Massachusetts Programmatic General Permit issued by the U.S. Army Corps of Engineers.

Recirculating means a system which treats and re-uses the same water, and from which no water is discharged to the coastal waters. No more than 10% of system water is changed on a daily basis, and discarded per an approved operational plan.

Section 10 means Section 10 of the U.S. Rivers and Harbors Act of 1899, administered by the U.S. Army Corps of Engineers (COA).

Section 404 means Section 404 of the U.S. Clean Water Act, administered by the U.S. Army Corps of Engineers.

Shellfish means clams, conchs, limpets, mussels, oysters, periwinkles, quahogs, razor clams, scallops, sea clams, sea quahogs, sea scallops and winkles (M.G.L. c.130).

15.03: Authorization

Unless otherwise provided by M.G.L. c.130 it is unlawful for any person to conduct a marine aquaculture operation in or on the coastal waters of the Commonwealth or in a land-based marine aquaculture system; possess or introduce seed shellfish or undersized regulated species into an aquaculture site or system, introduce adult shellfish into an aquaculture site; possess, maintain or cultivate marine organisms in any enclosure or system for purposes of sale, or sell culture organisms to aquaculture facilities unless in possession of an aquaculture permit issued by the Director pursuant to 322 CMR 7.01(4).

15.04: Permits

(1) There are a total of four permit classes which authorize systems, according to complexity and environmental risk, and five permit types which authorize various aquaculture operations using these systems. Each aquaculture permit issued pursuant to 322 CMR 7.01(4) shall authorize one class and one type each from the following lists:

(a) Permit Classes.

1. Class 1. Authorizes the operation of a land-based or vessel-based recirculating system with no discharge to coastal waters.
2. Class 2. Authorizes the operation of a land-based or vessel-based flow-through system, with or without partial recirculation, that withdraws water from a salt water well or coastal waters and discharges to coastal waters.
3. Class 3. Authorizes an open water system with minimal structures and no feeding.
4. Class 4. Authorizes an open-water system with feeding and/or permitted structures.

## 15.04: continued

(b) Permit Types.

1. Shellfish. Authorizes the possession and growing of seed shellfish from an approved source. May be endorsed for the use of upwellers or similar nursery systems to enlarge hatchery seed for planting, but not for resale. May be endorsed for the sale of regulated species below the minimum size established by regulation if an operational plan to control sale, shipment, tagging and record keeping is approved by the Director.
2. General. Authorizes the possession and growing of approved larval or juvenile marine organisms, except shellfish, and sale to a licensed Massachusetts Seafood Dealer. May be endorsed for the sale of regulated species below the minimum size established by regulation if an operational plan to control sale, shipment, labeling and record keeping is approved by the Director.
3. Shellfish Hatchery. Authorizes the propagation of seed shellfish from approved brood stock and the sale of seed shellfish to licensed aquaculture operations. Includes shellfish nursery operations that grow seed shellfish to a larger size for resale to other aquaculture operations.
4. Fish Hatchery. Authorizes the propagation and rearing of larval or juvenile marine organisms (all non-shellfish species) from approved brood stock, and sale of larval or juvenile organisms to licensed aquaculture operations or other entities permitted to possess and/or release juveniles of specific species.
5. Ornamental. Authorizes the propagation, possession, and sale of marine organisms for the aquarium trade.

15.05: Application

(1) Each applicant for a new aquaculture permit pursuant to 322 CMR 15.05 shall provide the following information on forms provided by the agency:

(a) Class 1 System.

1. Detailed Site Plan;
2. Detailed system layout, including water treatment systems;
3. Detailed operational plan (species, planting density, feeding rates, *etc.*);
4. Waste disposal plan (including solids, culls, and water).

(b) Class 2 System.

1. Same as 322 CMR 15.05(1)(a);
2. Proposed discharge, including volume and treatment, if required;
3. Evidence of DEP Water Quality Certification or exemption;
4. Evidence of NPDES Permit or exemption;
5. Evidence of permits for intake and discharge structures.

(c) Class 3 System (shellfish with minimal structures).

1. Detailed site plan including latitude and longitude of corners;
2. Geophysical site characteristics;
3. Benthic habitat conditions;
4. Proposed species, quantities, and densities;
5. Proposed physical structures;
6. Evidence of Municipal Shellfish Aquaculture License or conditional approval;
7. Evidence of Municipal Wetlands Permit or determination of non-applicability;
8. Evidence of application for Corps of Engineers, section 404 Permit or PGP;
9. Transcript of local public hearing.

(d) Class 4 System (shellfish or algae with significant structures).

1. Same as 322 CMR 15.05(1)(c);
2. Evidence of application for Army Corps of Engineers Section 10 Permit.

(e) Class 4 System (general).

1. Detailed site plan including latitude and longitude of corners;
2. Geophysical site characteristics;
3. Benthic habitat conditions;
4. Proposed species, quantities, and densities;
5. Proposed physical structures;
6. Detailed operational plan (species, density, feeding rates, *etc.*);

15.05: continued

7. Containment plan to prevent escapees;
8. Predator exclusion plan;
9. Anticipated habitat degradation issues and plan to minimize (Best Management Practices);
10. Disposal plan for culls and gear;
11. Evidence of performance bond sufficient to remove structures and restore site to its original condition;
12. Evidence of Water Quality Certification and NPDES Permit, if applicable.

(2) Renewals. Annual renewal of all existing permits may be made without supporting documentation provided no changes in use occur.

15.06: Site Review

(1) Applications for open-water aquaculture permits will be reviewed by the Division and cooperating agencies to determine if adverse impacts are likely to occur at the proposed site as a result of the operation of the permit. Topics for evaluation include, but are not limited to the following:

- (a) Water quality and hydrology;
- (b) Exposure/suitability of proposed structures;
- (c) Shellfish habitat and growing area classification;
- (d) Benthic habitat conditions;
- (e) Submerged aquatic vegetation;
- (f) Endangered species / marine mammals;
- (g) Competing uses of the area;
- (h) Wild fisheries;
- (i) Navigation;
- (j) Access to site.

(2) New Operations. Before making application for an aquaculture permit for a new operation or facility, the following steps are required by the applicant:

- (a) Contact the Aquaculture Program Coordinator in the Department of Agricultural Resources to obtain the following:
  1. Aquaculture Operation Description Form;
  2. MA Aquaculture Permits Guidance Document.
- (b) In consultation with the Aquaculture Program Coordinator, determine if a pre-application meeting is necessary with appropriate state and federal agencies.
- (c) Exception. Applicants for town-issued shellfish aquaculture permits are not required to follow 322 CMR 15.06(2)(a) and (b), and should follow local application procedures.

15.07: Biological Controls

(1) Source of Culture Animals.

- (a) It shall be unlawful to stock Class 2, 3 or 4 aquaculture systems with culture organisms except indigenous species purchased from a Division-licensed hatchery.
- (b) It shall be unlawful for any hatchery to sell culture organisms unless a representative sample of annual production has been certified to be disease-free by a qualified marine pathologist.
- (c) It shall be unlawful for a new hatchery or a hatchery establishing a new brood stock to begin operation before the source of the brood stock is approved by the Division and a representative sample is certified to be disease-free by a qualified marine pathologist.
- (d) Each hatchery must state how the question of genetic diversity will be addressed to help ensure the viability of culture organisms produced.
- (e) A Class 1 facility with appropriate controls may culture non-indigenous species from approved sources if authorized in writing by the Director pursuant to an approved operational plan.

15.07: continued

(f) The use of genetically-altered organisms may be approved on a case-by-case basis by written authorization of the Director, who shall at a minimum consider the ASMFC plan on Introduction and Transport as well as recommendations of the ICES Working Group on the Application of Genetics in Fisheries and Mariculture.

(2) Predator Control.

(a) Unless specifically authorized by the Director, in consultation with the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service it shall be unlawful to use lethal means to control or exclude predators or other organisms from an aquaculture facility. Non-lethal enclosures, including, but not limited to, nets, fences, bubble curtains and noise may be used, if approved for a specific site and purpose.

(b) Exception. It shall not be a violation of 322 CMR 15.07(2) to manually remove invertebrate predators, pests and fouling organisms from an aquaculture site and dispose of same in a lawful manner.

(3) Disease Action Plan. Each aquaculture facility and hatchery must develop, during its first year of operation, a disease action plan that includes the following elements:

- (a) Disease prevention measures specific to facility and species;
- (b) Destruction and disposal plan to remove diseased animals;
- (c) Quarantine procedures, if required;
- (d) Reporting.

(4) Discharge.

(a) Any discharge to surface waters from a Class 2 system, including those from vessels docked or anchored in coastal waters, shall be treated by filtration to remove solids and by disinfection, using an approved method, to kill biological effluents, including eggs, larvae, diseases and parasites.

(b) It shall be unlawful to discharge untreated water or solid waste to coastal waters from a Class 2 aquaculture facility. This provision shall not apply to shellfish hatcheries, shellfish upweller or nursery systems, or licensed shellfish wet storage operations. Finfish hatcheries where only live food is fed to the culture organisms or operations where it can be demonstrated that there is no degradation of receiving waters may be specifically exempted from 322 CMR 15.07(4) by an amendment to the Aquaculture Permit.

(c) It shall be unlawful to discharge any water from a Class 1 system to the coastal waters, unless specifically authorized by a NPDES Permit, and only if no non-indigenous species are present.

(5) Containment Plan. Each class 4 aquaculture facility shall submit a plan detailing how culture organisms will be prevented from escaping, including measures to exclude predators. The plan shall also contain any other measures to minimize the possibility of culture organisms interacting with wild stocks of the same species.

15.08: Operation

(1) Therapeutic and Chemical Usage.

(a) It shall be unlawful for any aquaculture permit holder to administer drugs or chemicals that have not been approved for use in aquaculture by USFDA, USEPA and USDA. Drugs or antibiotics may only be used if specifically listed in the conditions of the NPDES Permit and applied in a manner consistent with those conditions, under the supervision of a veterinarian.

(b) Other chemical treatments, including pesticides must be applied in a manner consistent with product labels and regulations of the Department of Agricultural Resources Pesticide Board so as not to compromise the health of culture organisms, the public or the environment.

(c) 322 CMR 15.08(1) shall not apply to the use of ice or salt in an aquaculture system.

(d) 322 CMR 15.08(1) shall not apply to the treatment of ornamental species in a Class 1 system.

15.08: continued

- (2) Disposal. It shall be unlawful to dispose of any gear or waste products on site or into coastal waters. All gear and waste products, including dead or dying culture animals, shall be disposed of in a landfill or other legal disposal site on land.
- (3) Performance Bond. For a Class 4 Aquaculture Permit a performance bond sufficient to cover the costs of gear removal and site restoration shall be a requirement for obtaining the permit.
- (4) Reporting.
  - (a) All licensed aquaculture operations shall submit annually to the Division the following information before January 31<sup>st</sup> for the preceding calendar year:
    - 1. Production by weight, volume, or number;
    - 2. Amount and sources of seed or juveniles purchased;
    - 3. Source and disposition of brood stock;
    - 4. Disease problems and unexplained mortality;
    - 5. Use and amount of chemicals, antibiotics or drugs.
  - (b) It shall be unlawful for the holder of an aquaculture permit to falsify or fail to submit the required annual report.
  - (c) All information submitted pursuant to this subsection shall be held in confidence, and may not be released except in summarized form, or in response to a valid court order.
- (5) Inspection. All permitted aquaculture operations shall be open to inspection during regular hours of operation by employees of the Division or any officer authorized to enforce the provisions of 322 CMR 15.08(5). Said inspection may include the collection, in the presence of the owner, of the minimum number of organisms required for testing if disease or contamination is suspected.
- (6) Permit Restrictions. The Director may restrict the operation of the permit to address unacceptable conditions or practices at the site, or amend other restrictions, as necessary.

15.09: Monitoring

All Class 4 aquaculture operations in which culture organisms are fed are required to monitor pre-operation and post-operation environmental conditions at the site, using the services of an individual or firm qualified to perform this work. Conditions to be monitored and frequency shall be as specified in the NPDES Permit, including:

- (a) Dissolved Oxygen Profiles. Operation of the facility must not degrade the classification of receiving waters by lowering dissolved oxygen saturation to less than 85% of ambient conditions;
- (b) Video Transects of Sea Floor Beneath Pens to Document Potential Degradation of Benthic Habitat. Signs of degradation shall include changes in sediment composition, azoic or anoxic conditions, outgassing, and growth of bacterial mats;
- (c) Infauna. Abundance and relative diversity of benthic organisms;
- (d) If habitat degradation is determined through monitoring, a corrective plan will be prepared in consultation with the permit holder and EPA. Corrective measures may include improved best management practices or temporary removal of gear.

15.10: Non-indigenous Species

- (1) It shall be unlawful for any person to release any living organism into coastal waters of the Commonwealth unless authorized to do so by the Director in writing, except that fish taken pursuant to lawful fishing operations or scientific collection may be released immediately back to the area of capture.

15.10: continued

(2) It shall be unlawful for any person to possess, propagate or hold non-indigenous marine organisms for any purpose in any system with an untreated discharge to surface waters. Any facility desiring to hold non-indigenous organisms for any purpose must submit an operational plan detailing measures designed to prevent the escape or release of organisms or the discharge of biological effluents, including eggs, larvae, parasites and diseases into the marine environment, and an acceptable non-polluting plan for the disposal of carcasses and biological wastes.

(a) The Director may issue a Special Scientific Permit to an educational or research institution, or a Class 1 Aquaculture Permit to a commercial aquaculture facility, to hold non-indigenous species, provided that an acceptable operational plan to prevent unintentional releases or escapes is submitted with the application.

(b) The Director may issue a Class 1 Ornamental Aquaculture permit to an aquarium shop or hatchery that propagates and/or holds non-indigenous marine organisms for the aquarium trade pursuant to an approved operational plan.

REGULATORY AUTHORITY

322 CMR 15.00: M.G.L. c. 21A, § 2, c. 30A, § 3 and c. 130, §§ 2, 17B, 23, 24, 25, 27, 28, 57, 69, 80, 82 and 104.

## 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](http://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](http://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](http://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 1<sup>st</sup> through October 31<sup>st</sup>, 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 2<sup>5</sup>/<sub>8</sub> inches in height by 5<sup>1</sup>/<sub>4</sub> 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 19<sup>th</sup> through October 19<sup>th</sup> 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 1<sup>st</sup> through September 15<sup>th</sup>, 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 1<sup>st</sup> and September 15<sup>th</sup>, 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.



# INCREASING LOCAL FOOD PROCUREMENT BY MASSACHUSETTS STATE AGENCIES

April 2015



**Harvard**  
Food Law and Policy Clinic  
A Division of the Center for Health Law and Policy Innovation

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## EXECUTIVE SUMMARY

In recent years, there has been increasing demand for locally grown food as consumers, policymakers, and advocacy groups recognize the health, environmental, and economic benefits of purchasing food from local farmers. Many states have noted the potential for public institutions to serve as leading purchasers of locally grown food (meaning, food produced within the state), and have enacted legislation instructing state institutions to apply a purchasing preference for food grown within the state. In 2006, Massachusetts enacted one such law, codified in the General Laws of Massachusetts at Chapter 7, Section 23B (Section 23B). Section 23B requires state agencies, as well as state colleges and universities, to prefer food products grown or produced in Massachusetts over foods grown or produced in other states. In order to effectuate this broad preference for Massachusetts-grown food products, the law requires state agencies—but not state colleges or universities—to purchase food products grown in Massachusetts, unless the price is more than 10% higher than the price of comparable out-of-state food products.

While Section 23B reflects the state legislature's desire to increase the amount of Massachusetts-grown foods, not much local food is being purchased by Massachusetts state agencies. Many state agencies have yet to achieve full implementation of the 10% price preference as required by Section 23B. Discussions with agency officials and purchasers revealed that little progress has been made since Section 23B's enactment in establishing contracts with vendors who source agricultural products from Massachusetts farms.

Under Massachusetts' procurement law, state agencies are required to form Procurement Management Teams to oversee the creation of a Request for Response (RFR) that seeks bidders to satisfy a procurement solicitation. A procurement contract must meet a number of requirements including:

- ❖ it must be the best value to the state, as evidenced by nine different criteria;
- ❖ it must be awarded to a Small Business Purchasing Program participant if the contract is between \$50,000 – \$150,000 and other contract requirements are met;
- ❖ for procurements over \$150,000, it must contain a supplier diversity plan; and
- ❖ for contracts procuring food, it must comply with Executive Order 509, which established nutrition standards for agency procured food.

As a general rule, agencies are required to procure goods under existing statewide contracts. There are three statewide food contracts: the prime grocer contract, the dairy contract, and the baked goods contract. The prime grocer contract is the largest state agency food contract and requires bidders to supply both locally available and non-locally available food. To be in compliance with Section 23B, agencies are required only to include basic contractual language provided by Operational Services Division (OSD) (the state agency in charge of procurement). Vendors are required to make a firm commitment to purchase food grown in Massachusetts in their contract proposals in order to comply with Section 23B.

Interviews and discussions with key stakeholders from around the state revealed various barriers to successfully implementing Section 23B's goal of increased local food procurement. As discussed above, the bar for agency compliance with Section 23B is very low. Further, the bar for vendor compliance is also low; vendors that expressly acknowledged that they did not purchase locally grown food were still awarded contracts. Unlike other procurement support programs, there is very little information about Section 23B or how to increase local food purchasing on OSD's website. There is no mechanism to track nor report the amount of locally grown food. Without adequate tracking and reporting mechanisms, it is nearly impossible to measure and report ongoing progress in implementing Section 23B.

Although Section 23B provides a price preference for locally grown food purchased by agencies, it does not provide much incentive to purchase local food. Other states have used a benchmark to give agencies an indicator to work toward; a benchmark requires an agency to purchase a set amount of food or spend a certain amount of money on local food. Massachusetts does not have any kind of benchmark to push agencies to purchase local food. There are existing programs that provide procurement support to certain types of businesses – small business and minority-owned and women-owned business enterprises – that farmers could use to connect to agency purchasers, but have not done so. Farmer enrollment in the Small Business Purchasing Program and the Supplier Diversity Program is almost non-existent. Finally, the prime grocer contract requires bidders to be able to provide food that can be locally grown as well as food that cannot be locally grown. This could preclude local farmers from bidding on the prime grocer contract as vendor or subvendor.

Taking these barriers into consideration, the following recommendations can be pursued to increase local food procurement by Massachusetts state agencies:

- ❖ ***Advocate for the creation of educational materials on Section 23B for agency purchasers and farmers.*** Besides the basic contract language ensuring compliance with Section 23B, state agency food purchasers may not be fully aware of nor understand Section 23B and its requirements. To address this issue, there are several solutions, including the creation of educational materials and a local food purchasing directory, as well as providing informational sessions for farmers and agency purchasers.
- ❖ ***Advocate for the establishment of a tracking mechanism and reporting requirement for local purchasing.*** Although Massachusetts has a strong procurement preference law, there is currently no mechanism for tracking the amount of food that is being procured locally. Without this information, it is difficult to assess what opportunities exist for purchasing local food and any progress that is being made. Advocates should ask the legislature to establish a tracking mechanism within Section 23B. Additionally, requiring reporting of local food purchasing will establish a baseline and assist agencies in setting goals and finding ways to achieve those goals.
- ❖ ***Advocate for legislation to establish a benchmark for Massachusetts' local purchasing.*** One way to increase state agency accountability under Section 23B is to establish yearly benchmark goals for amounts of locally grown food purchased by each agency. The benchmark would take the form of a target percentage of food purchased by state agencies for a future year (e.g., by 2020, locally grown food will represent 15% of total dollars spent on food purchases).

- ❖ ***Encourage farmers to enroll in E.O. 503's Small Business Purchasing Program.*** The Small Business Purchasing Program (SBPP) requires agencies to award contracts between \$50,000-\$150,000 to SBPP participants. Although this existing program is a good option for farmers, it appears that no farmers are participating. Unless a new policy is created, establishing a program focused specifically on Massachusetts local food businesses, advocates can alternatively encourage farmers to enroll in Massachusetts' SBPP so that they can increase their chances of being awarded small food procurement contracts.
- ❖ ***Encourage farmers to enroll in the Supplier Diversity Program.*** The Supplier Diversity Program (SDP) encourages agencies to select bidders that work with minority- owned and women-owned business enterprises (M/WBE) by giving 10% of response evaluation points to a bidders' supplier diversity plan. To support these businesses, OSD maintains a list of M/WBE that are listed above other suppliers, sets a benchmark for agencies to meet, and provides other administrative support to agencies. For farmers that meet the SDP criteria, this could be another way to connect with agency purchasers to increase local food procurement.
- ❖ ***Advocate for a new policy establishing a Massachusetts-grown Agricultural Products Purchasing Program.*** Advocates can use Section 23B to garner support for a new policy (established through legislation or an executive order) to create a Massachusetts-grown Agricultural Products Purchasing Program (MAPPP). Under this policy, state agencies would be directed to give "special consideration" in their food procurement practices to Massachusetts farms or farm aggregators who enroll in the program. It would call for enhanced accountability, the development of benchmarks, an annual review of progress, as well as information-sharing processes, none of which is provided for under the current language of Section 23B. Another benefit of establishing this policy is that it would address the challenges state agencies currently face in tracking whether food products originate in Massachusetts. Under this policy, agencies would know whether a vendor sources a significant amount of food from local farms based on the vendor's MAPPP enrollment status and self-identification as a Massachusetts farmer or aggregator.
- ❖ ***Advocate for splitting produce contracts.*** Farmers and aggregators otherwise able to meet the volume of agency produce contracts nevertheless face the barrier that certain food items specified in the state contracts are not grown in Massachusetts and thus they cannot fulfill the RFR. To overcome this barrier, OSD can split the prime grocer contract and agencies can split their contracts so that all of the food able to be grown in Massachusetts is included in one contract, and all other food is included in another.
- ❖ ***Advocate for a regional preference in Section 23B, which would provide a 5-7% preference for food procured from New England.*** While the purchase of in-state food will do the most to strengthen the Massachusetts economy, agencies can add variety to their menus by sourcing beyond the state borders. Regional food systems are now recognized as valuable resources for maintaining healthy diets and economies. New England, in particular, has a strong and growing regional food economy that could contribute to and benefit from a regional food preference. When local food is not available, regionally sourced items should be in a second preference tier and be given a 5-7% preference, for example.

In addition to these overall recommendations, several opportunities to modify the purchasing practices of particular agencies to increase local purchasing were identified. These opportunities are discussed in more detail in the report. With assistance from advocates such as the Massachusetts Farm to School Project (the client for this report), agencies can make significant progress toward purchasing fresh, nutritious, locally-grown foods, invigorating Massachusetts' farming economy, and supporting a sustainable, local food system.

# I. INTRODUCTION

In recent years, consumer demand for locally grown food has increased steadily, as more people choose to spend their food dollars through farmers markets, farm stands, farm-to-table restaurants, community supported agriculture (CSAs), and grocery stores that source locally grown agricultural products.<sup>1</sup> There are a few main reasons why consumers purchase locally grown foods. In addition to environmental and nutritional concerns, consumers buy local because of its economic benefits to farmers and the local economy. As the market for locally grown food increases, it creates a stable and significant source of revenue for farmers, making farming a more viable profession and encouraging farmers to spend money in other parts of the local economy, such as on personal expenses, farm supplies from Massachusetts businesses, and hiring labor. Local food initiatives are particularly beneficial to small- and mid-sized farms, which derive a significant portion—if not all—of their revenue from local sales.<sup>2</sup> Purchasing food from a nearby farm also stimulates the local economy; money spent locally circulates within that community between six and fifteen times, supporting farms, businesses, and community members.<sup>3</sup> One Connecticut-based study showed that for each dollar in agricultural sales, an additional dollar is spent on other economic activity in the state.<sup>4</sup>

Recognizing other opportunities to support local agriculture apart from direct-to-consumer sales, local food advocates have begun to focus on institutional purchasing as an alternative marketing channel for locally grown food. Increasing local food procurement by institutions has a number of benefits. First, it demonstrates the growing demand for these local food products and supports the continued development and expansion of small- and mid-sized farms. Institutional purchasing of local food products is beneficial for farms that are currently selling through increasingly competitive and, at times, saturated retail markets. Second, local food procurement has economic benefits (as mentioned earlier) in that it keeps more dollars in the local economy rather than sending those dollars out of the state (or country). Third, consumers benefit from increased availability of fresh food in the institutions that source local food.

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<sup>1</sup> For example, the number of farmers markets in the United States has more than quadrupled over the past twenty years. *Farmers Markets and Local Food Marketing*, U.S. DEP'T OF AGRIC., <http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateS&leftNav=WholesaleandFarmersMarkets&page=WFMFarmersMarketGrowth&description=Farmers+Market+Growth> (last visited Jan. 3, 2015).

<sup>2</sup> See Sarah A. Low & Stephen Vogel, *Direct and Intermediated Marketing of Local Foods in the United States*, U.S. DEP'T OF AGRIC. 4–5 (Nov. 2011), available at <http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5097250> (last visited Jan. 3, 2015).

<sup>3</sup> KELLI SANGER & LESLIE ZENZ, WASH. STATE DEP'T OF AGRIC., *FARM-TO-CAFETERIA CONNECTIONS: MARKETING OPPORTUNITIES FOR SMALL FARMS IN WASHINGTON STATE 2* (2004), available at <http://agr.wa.gov/Marketing/SmallFarm/docs/102-FarmToCafeteriaConnections-Web.pdf> (last visited Jan. 3, 2015).

<sup>4</sup> RIGOBERTO LOPEZ ET AL., *ECONOMIC IMPACTS OF CONNECTICUT'S AGRICULTURAL INDUSTRY*, UNIV. OF CONNECTICUT DEP'T OF AGRIC. AND RES. ECON. AND THE CONNECTICUT CTR. FOR ECON. ANALYSIS 5 (Sept. 2010), <http://www.are.uconn.edu/documents/economicimpacts.pdf> (last visited Jan. 3, 2015).

Many states have noted the potential for public institutions to serve as leading purchasers of locally grown food, and have enacted legislation to promote the use of food grown within the state by creating a procurement preference for in-state products or businesses.<sup>5</sup> In fact, according to research conducted for this report, thirty-seven states have some form of law that offers a preference to local products, fourteen of which focus specifically on local food products (for more information about local

### ***Local Food Sector Growth in Massachusetts***

In Massachusetts, the number of farms that sold agricultural products directly to consumers increased from 1,659 farms in 2007 to 2,206 farms in 2012. This means that in 2012 nearly 28.5% of the 7,755 farms in Massachusetts sold agricultural products through direct marketing outlets. The value of these direct marketing sales increased from \$42 million in 2007 to \$48 million in 2012. Some of these farmers may be seeking more stable market outlets, and increasing local procurement by Massachusetts agencies can provide that opportunity.

**Source:** U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE, MASSACHUSETTS STATE DATA, TABLES 1, 2 (2014), *available at* [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/Massachusetts/mav1.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/Massachusetts/mav1.pdf).

procurement laws in the United States, see Appendix E: Procurement Laws across the United States).

In 2006, the Massachusetts Legislature passed its own local food procurement law, codified in the General Laws of Massachusetts at Chapter 7, Section 23B (Section 23B). The law requires state agencies to prefer Massachusetts-grown food over food grown outside of the state, unless the price of the in-state food exceeds the price of the out-of-state food by more than 10%.<sup>6</sup> In 2010, part of the law was amended to extend responsibility for procuring Massachusetts-grown food to state institutions of higher learning, although instead of being subject to the same 10% price preference, colleges and universities are only required to use “reasonable efforts” to purchase in-state food.<sup>7</sup> In fall 2012, the

Harvard Food Law and Policy Clinic published a report for the Massachusetts Farm to School Project<sup>8</sup> and the Massachusetts Food Policy Alliance<sup>9</sup> that analyzed Section 23B and its implementation by state colleges and universities, entitled: *Increasing Local Food Procurement by Massachusetts State Colleges & Universities*.<sup>10</sup> Based on interviews with several of the state college and university dining services programs and food service management companies, that report proposed recommendations to increase the purchasing of local foods by these academic institutions.

<sup>5</sup> See *infra* Appendix E: Procurement Laws across the United States.

<sup>6</sup> MASS. GEN. LAWS ANN. ch. 7, § 23B(a) (West 2013). The law is reproduced in full in Appendix B: Massachusetts General Laws, Chapter 7, Section 23B.

<sup>7</sup> School Nutrition, H.R. 4459, 186th Gen. Ct. (Mass. 2010).

<sup>8</sup> The Massachusetts Farm to School Project is a grassroots initiative that works to facilitate sustainable purchasing relationships between farms and institutions statewide to support the local agricultural economy and improve access to healthy food for all.

<sup>9</sup> The Massachusetts Food Policy Alliance is a group of stakeholders working to create a sustainable, effective, and inclusive food system for Massachusetts.

<sup>10</sup> See JONATHAN ABRAMS, ET AL., HARVARD FOOD LAW & POL'Y CLINIC, *INCREASING LOCAL FOOD PROCUREMENT BY MASSACHUSETTS COLLEGES & UNIVERSITIES* (2012), *available at* <http://www.chlpi.org/wp-content/uploads/2013/12/Increasing-Local-Food-Procurement-by-Mass-State-Colleges-FINAL2.pdf> (last visited Jan. 3, 2015).

As a follow-up to that report, the Massachusetts Farm to School Project requested an investigation of food procurement practices among the various Massachusetts state agencies, including a discussion of how well agencies are currently implementing Section 23B and ways in which agencies can increase efforts to purchase food grown within Massachusetts. In order to present the most accurate picture of the current procurement practices in Massachusetts, this report analyzes the Massachusetts law, integrates interviews with stakeholders involved in state agency procurement in Massachusetts, and includes data on local preference laws in other states, as well as offers policy recommendations.

This report begins with a discussion of Massachusetts' procurement laws, both in general and specifically for local food procurement. This is followed by an overview of Massachusetts' procurement practices and requirements, including a discussion of three statewide food procurement contracts. The report then identifies and discusses barriers to local food procurement and recommendations for how advocates such as the Massachusetts Farm to School Project can work to increase local procurement by those agencies, either by working within the existing legal framework or by pushing for further legislative or executive actions. Following that discussion are descriptions of and recommendations for the nine state agencies that serve food to dependent clients, collectively representing the largest food purchasers in the Executive Branch. Finally, the Appendices to the report contain important additional information referenced throughout the report, including the language of Section 23B, and charts illustrating procurement laws across the United States.

## II. RESEARCH METHODS

Massachusetts has eighty-two executive branch agencies, many of which purchase food to serve to employees and/or clients. Instead of surveying the practices of all eighty-two agencies, this report focuses on the nine agencies that serve food to dependent clients, as they represent the largest food purchasers. The nine agencies collectively serve forty-two million meals annually,<sup>11</sup> and thus have the purchasing power to impact the Massachusetts food economy. These agencies are:<sup>12</sup>

- Department of Children and Families;
- Department of Correction;
- Department of Developmental Services;
- Executive Office of Elder Affairs;
- Department of Mental Health;
- Department of Public Health;
- the sheriffs' offices;
- Department of Veterans' Services;<sup>13</sup> and
- Department of Youth Services.

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<sup>11</sup> Excluding snacks. CYNTHIA TAFT BAYERL, MASS. DEP'T OF PUB. HEALTH, MASSACHUSETTS DEPARTMENT OF PUBLIC HEALTH SKILLS AND STRATEGIES FOR DEVELOPING AND IMPLEMENTING FOOD PROCUREMENT POLICIES: EO 509 2 (2012), *available at* <http://fnce.eatright.org/fnce/uploaded/634796052281380677-225.%20Bayerl.pdf> (last visited Jan. 3, 2015).

<sup>12</sup> This list comes from a presentation given by Cynthia Taft Bayerl from the Massachusetts Department of Public Health. *Id.*

<sup>13</sup> This includes the Soldiers' Homes in Chelsea and Holyoke.

This report is based on in-depth research from a variety of sources as well as interviews with key participants and stakeholders. The research required identifying and analyzing relevant Massachusetts statutes and regulations pertaining to food procurement; understanding the Massachusetts' online procurement system, COMMBUYS (formerly known as the Commonwealth Procurement Access and Solicitation System (Comm-PASS) <sup>14</sup>); and reviewing and analyzing active agency food contracts and contract solicitations. Interviews with key agency personnel,<sup>15</sup> one farmer, and one aggregator supplemented the legal research.

### III. MASSACHUSETTS' CURRENT PROCUREMENT LAWS & POLICIES

State procurement is a highly standardized and regulated process in Massachusetts, and agencies must ensure that they purchase all goods and services on behalf of the state in accordance with Massachusetts' laws and regulations. This section provides the legal and regulatory framework, focusing both on the general and local food-specific requirements for all state agency solicitations for contracts and procurements, as well as standard practices followed by state agencies in Massachusetts.

#### *A. Massachusetts' Procurement Laws*

State agencies engaged in food purchasing must comply with Massachusetts' overarching procurement regime and food specific purchasing requirements. Chapter 30 of Massachusetts General Laws establishes rules and regulations that all agencies must follow when purchasing any goods. Chapter 7 of Massachusetts General Laws contains other specific procurement provisions, including Section 23B, the local food procurement law (hereinafter "Section 23B"). This section introduces Massachusetts' current procurement laws.

#### **1. Chapter 30: Massachusetts' General Procurement Laws**

Chapter 30 of the Massachusetts General Laws sets out requirements for the administration of the state government, including the procurement of goods by state government entities.<sup>16</sup> The legal requirements of Chapter 30 only apply to executive branch state agencies.<sup>17</sup> There are eighty-two agencies within the Executive Branch, all of which are subject to Chapter 30's procurement requirements. These agencies

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<sup>14</sup> Press Release, Operational Services Division, The Commonwealth's New Procurement System COMMBUYS (Nov. 4, 2013), available at <http://www.mass.gov/anf/docs/osd/commbuys/commbuys-announcement-to-statewide-contractors.pdf> (last visited Jan. 3, 2015).

<sup>15</sup> Key agency personnel included staff of the Department of Public Health, the Department of Correction, the Executive Office of Elder Affairs, the Department of Children and Families, and the Operational Services Division (Massachusetts' centralized procurement office).

<sup>16</sup> See generally MASS. GEN. LAWS ANN. ch. 30 et seq. (West 2013); MASS. GEN. LAWS ANN. ch. 30 § 51 (West 2013).

<sup>17</sup> MASS. OPERAT'L SERVS. DIV., PROCUREMENT OVERVIEW 3 (2013), available at [www.mass.gov/anf/docs/osd/pic/procurement-intro.doc](http://www.mass.gov/anf/docs/osd/pic/procurement-intro.doc) (last visited Jan. 3, 2015).

are listed in Appendix D: Massachusetts Executive Agencies.<sup>18</sup> Chapter 30 does not apply to the legislative or judicial branches, constitutional offices, elected offices, institutions of higher education, the military division, or independent public entities.<sup>19</sup> These entities, along with local cities, towns, and municipalities, are encouraged, but not required, to follow the procurement practices set forth for executive agencies.<sup>20</sup>

Under Chapter 30 of the Massachusetts General Laws, procurement of all goods and services needed by executive branch state agencies must be undertaken by, or under the direction of, the Operational Services Division (OSD).<sup>21</sup> OSD is an oversight agency in the Executive Office for Administration and Finance.<sup>22</sup> It establishes statewide contracts on behalf of agencies and other purchasers, provides technical assistance, and monitors compliance with applicable procurement statutes, regulations, and policies.<sup>23</sup> The Office of the Comptroller (CTR) also plays a role in agency procurement. CTR is an independent oversight agency, tasked with monitoring Massachusetts' broader fiscal activities.<sup>24</sup> CTR operates jointly with OSD to establish protocols for agencies forming procurement contracts.<sup>25</sup>

Each state agency is responsible for demonstrating compliance with all procurement laws and regulations by maintaining updated procurement files with OSD.<sup>26</sup> OSD, along with CTR, reviews the files to determine compliance and to ensure the quality of contractor performance.<sup>27</sup>

## 2. Chapter 7, Section 23B: Massachusetts' Local Procurement Law

When purchasing food, Massachusetts state agencies must also comply with Massachusetts' local procurement law. Section 23B was enacted in 2006 as part of an economic investment package designed to “promote job creation, economic stability, and competitiveness in the Massachusetts economy.”<sup>28</sup> Initially, the law applied only to a “state agency or authority,” and instructed procurement agents of those entities to apply a 10% price preference in their procurement processes to in-state

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<sup>18</sup> Nine of these eighty-two agencies—those that serve food to the public—are subject to both Operational Services Division procurement regulations and Massachusetts Executive Order 509 (establishing nutrition standards).

<sup>19</sup> 801 MASS. CODE REGS. 21.00(2) (2013).

<sup>20</sup> MASS. GEN. LAWS ANN. ch. 7 § 22A (West 2013).

<sup>21</sup> MASS. GEN. LAWS ANN. ch. 30 § 51 (West 2013).

<sup>22</sup> *Operational Services Division*, MASS.GOV, <http://www.mass.gov/anf/budget-taxes-and-procurement/oversight-agencies/osd/> (last visited Jan. 3, 2015).

<sup>23</sup> MASS. OPERAT'L SERVS. DIV., *supra* note 17, at 6–7. OSD is responsible for managing, monitoring, and enforcing the requirements of the Small Business Purchasing Program (SBPP), as created by Executive Order 523 (E.O. 523), and is tasked with assisting agencies in their implementation of Executive Order 509 (E.O. 509), which establishes nutrition standards for the foods that certain agencies serve. Mass. Exec. Order No. 523 (June 29, 2010), <http://www.mass.gov/governor/legislationeeexecorder/executiveorder/executive-order-no-523.html> (last visited Jan. 3, 2015); BILL MCAVOY & JOHN AUERBACH, MASS. OPERAT'L SERVS. DIV., OSD POLICY GUIDANCE 11-02 – REVISED GUIDANCE FOR EXECUTIVE ORDER 509 (n.d.), *available at* <http://archives.lib.state.ma.us/bitstream/handle/2452/205628/ocn843407657-2011-03-07.pdf?sequence=1&isAllowed=y> (last visited Apr. 11, 2015).

<sup>24</sup> MASS. OPERAT'L SERVS. DIV., *supra* note 17, at 7.

<sup>25</sup> CTR also issues standards related to making payments for commodities and services through the Massachusetts electronic accounting system, known as the Massachusetts Management Accounting and Reporting System (MMARS). *Id.*

<sup>26</sup> *Id.* at 9, 11.

<sup>27</sup> *Id.* at 11.

<sup>28</sup> Economic Investments, H.R. 5057, 184th Gen. Ct. (Mass. 2006).

agricultural products.<sup>29</sup> In 2010, the legislature added language to the statute pertaining specifically to state colleges and universities, requiring that they make “reasonable efforts” to facilitate the purchase of locally grown products.<sup>30</sup> The amendment as passed did not impose the 10% price preference requirement on colleges and universities,<sup>31</sup> although the original proposed bill would have done so.<sup>32</sup>

Section 23B requires state agencies to give preference in their procurement processes to agricultural products grown or produced in Massachusetts over agricultural products grown or produced in other states.<sup>33</sup> The law defines agricultural products broadly to include “fruits, vegetables, eggs, dairy products, meats, crops, horticultural products . . . as well as fish, seafood, and other aquatic products.”<sup>34</sup> Also included are value-added products processed “as part of a Massachusetts farm operation,” such as canned goods, dried fruits, or pre-cut produce, as well as products “produced using agriculture grown in Massachusetts.”<sup>35</sup>

Section 23B is divided into three parts. Subsection (a) states, generally, that Massachusetts agencies, authorities, colleges and universities must prefer food grown in the Commonwealth in their procurement processes.<sup>36</sup> To achieve this preference, subsection (b) instructs procurement agents for those state entities to “make reasonable efforts” in advertising for bids and contracts to “facilitate” the purchase of Massachusetts-grown food.<sup>37</sup> Subsection (c) applies only to state agencies and authorities, and requires them to purchase food grown in-state when the price of Massachusetts food is less than 10% more expensive than the price of food grown elsewhere.<sup>38</sup>

In early 2007, shortly after the legislature enacted Section 23B, OSD sent a guidance letter to all agency heads advising them of the new agricultural products preference law and providing instructions on how to comply with its requirements.<sup>39</sup> According to the OSD letter, agencies will be in compliance with Section 23B’s “reasonable efforts” requirement so long as they include certain language in their solicitations for

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<sup>29</sup> MASS. GEN. LAWS ANN. ch. 7, § 23B (West 2013).

<sup>30</sup> School Nutrition, H.R. 4459, 186th Gen. Ct. (Mass. 2010). For further information on Section 23B’s application to and implementation by state colleges and universities, *See* ABRAMS, ET AL., *supra* note 10.

<sup>31</sup> *See* MASS. GEN. LAWS ANN. ch. 7, § 23B(a) (West 2013).

<sup>32</sup> Local Farm Products Bill, H. 2107, 186th Gen. Ct. (Mass. 2009).

<sup>33</sup> MASS. GEN. LAWS ANN. ch. 7, § 23B(a) (West 2013). The law is reproduced in full in Appendix B: Massachusetts General Laws, Chapter 7, Section 23B.

<sup>34</sup> MASS. GEN. LAWS ANN. ch. 7, § 23B(a) (West 2013).

<sup>35</sup> *Id.* The law also incorporates by reference the language of Chapter 128, Section 1A, defining “agriculture” as “includ[ing] farming in all of its branches and the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural, aquacultural, floricultural or horticultural commodities, the growing and harvesting of forest products upon forest land, the raising of livestock including horses, the keeping of horses as a commercial enterprise, the keeping and raising of poultry, swine, cattle and other domesticated animals used for food purposes, bees, fur-bearing animals, and any forestry or lumbering operations, performed by a farmer, who is hereby defined as one engaged in agriculture or farming as herein defined, or on a farm as an incident to or in conjunction with such farming operations, including preparations for market, delivery to storage or to market or to carriers for transportation to market.” MASS. GEN. LAWS ANN. ch. 128, § 1A (West 2013).

<sup>36</sup> MASS. GEN. LAWS ANN. ch. 7, § 23B(a) (West 2013).

<sup>37</sup> *Id.* at § 23B(b).

<sup>38</sup> *Id.* at § 23B(c).

<sup>39</sup> COMMUNITY INVOLVED IN SUSTAINING AGRICULTURE, FARM TO CAFETERIA: A GUIDE TO BUILDING FARM TO SCHOOL RELATIONSHIPS IN MASSACHUSETTS 9 (2008) (referencing a letter from Ellen Bickelman, State Purchasing Agent, to Mass Dep’t Heads, Chief Fiscal Officers, & Gen. Counsels (Jan. 11, 2007)), *available at* [http://www.buylocalfood.org/~buylocal/upload/resource/Farm\\_to\\_school\\_manual08.pdf](http://www.buylocalfood.org/~buylocal/upload/resource/Farm_to_school_manual08.pdf) (last visited Jan. 3, 2015).

bids, without taking any additional steps.<sup>40</sup> The standard language merely informs potential bidders that the agency must purchase locally grown agricultural products unless the price exceeds 10% of the price of equivalent out-of-state products (see Appendix C for a copy of the letter in its entirety).<sup>41</sup>

## **B. The Procurement Process**

### **1. Competitive Bidding Process**

Under Massachusetts' procurement laws, procurement of food and all other goods and services must take place through a competitive bidding process, except for incidental purchases of goods not available on current statewide contracts, and other limited exceptions.<sup>42</sup>

For most large procurements (those with values greater than \$150,000), OSD forms Procurement Management Teams (PMTs) across agencies with common purchasing interests, to help ensure that the contracts offer the best value to the state.<sup>43</sup> These inter-agency teams participate in all aspects of the competitive bidding/procurement process: conducting research, determining the scope and specifications of the solicitation (a Request for Response (RFR)), soliciting responses from bidders, developing solicitation evaluation criteria, negotiating the contract, monitoring contract performance, and executing options to renew, when appropriate.<sup>44</sup> Teams consist of members from agencies that have an interest or expertise in the goods or services being purchased as well as the OSD staff members responsible for those particular categories of goods or services.<sup>45</sup>

For small procurements (those with values less than or equal to \$150,000), departments either individually or jointly create similar procurement teams, comprised of members of various agencies familiar with the goods or services being purchased as well as procurement staff within the particular agency conducting the procurement.<sup>46</sup> Individual departments may also request that staff from other departments or OSD join their procurement teams.<sup>47</sup>

For one-time unanticipated purchases of less than \$10,000, agencies may forego the procurement process (called an incidental purchase).<sup>48</sup> However, agencies may not make an incidental purchase of

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> 801 MASS. CODE REGS. 21.05, 21.06 (2012). Incidental purchases are "one-time, non-recurring, unanticipated" and have a maximum value of \$10,000. MASS. OPERAT'L SERVS. DIV., *supra* note 17, at 21.

<sup>43</sup> MASS. OPERAT'L SERVS. DIV., *supra* note 17, at 7-8.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 8.

<sup>47</sup> *Id.*

<sup>48</sup> MASS. OPERAT'L SERVS. DIV., INCIDENTAL PURCHASING POLICY GUIDANCE (2007), *available at* [www.mass.gov/anf/docs/osd/pic/ip.doc](http://www.mass.gov/anf/docs/osd/pic/ip.doc) (last visited Apr. 3, 2015); *OSD News Archives: OSD/CTR Issue New Policies*, MASS. OPERAT'L SERVS. DIV., *available at* <http://www.mass.gov/anf/budget-taxes-and-procurement/procurement-info-and-res/procurement-prog-and-serv/sdo/osd-archive-news-items.html> (last visited Apr. 3, 2015).

commodities or services that are available on statewide contracts.<sup>49</sup> As discussed below, food and agricultural products are available on statewide contracts.

The first step in the competitive bidding process is the drafting of an RFR, during which the procurement team—either a PMT or smaller department-specific procurement team—ensures that its RFR complies with all applicable OSD regulations.<sup>50</sup> For small procurements, the procurement team must include in the RFR notice of its intent to award the contract to qualified participants of the Small Business Purchasing Program (SBPP), in accordance with Executive Order 523 (E.O. 523).<sup>51</sup>

Once the RFR has been finalized,<sup>52</sup> it is posted to Massachusetts' online procurement system, COMMBUYS (formerly known as the Commonwealth Procurement Access and Solicitation System (Comm-PASS)).<sup>53</sup> Interested bidders may view and obtain an electronic copy of the RFR through COMMBUYS.<sup>54</sup> If the bidder wishes to place a bid, he or she must then submit a written response to the RFR.<sup>55</sup>

The procurement team evaluates the responses and selects vendors based on the “best value” principles outlined in OSD guidance documents.<sup>56</sup> A contract represents the “best value” to the agency and the state when it follows nine principles:

- (1) it supports the achievement of required performance outcomes;
- (2) it generates the best quality economic value;
- (3) it is performed timely;
- (4) it minimizes the burden on administrative resources;
- (5) it expedites simple or routine purchases;
- (6) it allows flexibility in developing alternative procurement and business relationships;
- (7) it facilitates competition;
- (8) it encourages the continuing participation of quality contractors; and
- (9) it supports state and department procurement planning and implementation.<sup>57</sup>

## 2. Other Procurement Requirements

In addition to ensuring a contract bid is the “best value,” there are other programs with which agencies may have to comply.<sup>58</sup> Two of these programs—the Supplier Diversity Program (SDP) and the Small

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<sup>49</sup> MASS. OPERAT'L SERVS. DIV., *supra* note 48.

<sup>50</sup> See 801 MASS. CODE REGS. 21.06(4) (2012); MASS. OPERAT'L SERVS. DIV., *supra* note 17, at 8.

<sup>51</sup> MASS. OPERAT'L SERVS., *supra* note 17, at 21.

<sup>52</sup> An RFR is finalized when the procurement team makes sure that the contract requirements are met and that the contract specifies the types of goods or services required.

<sup>53</sup> MASS. OPERAT'L SERVS. DIV., *supra* note 17, at 13; Press Release, Operational Services Division, *supra* note 1412.

<sup>54</sup> COMMBUYS, <https://www.commbuys.com/bso/> (last visited Jan. 3, 2015).

<sup>55</sup> MASS. OPERAT'L SERVS. DIV., *supra* note 17, at 21.

<sup>56</sup> 801 MASS. CODE REGS. 21.01 (2012); MASS. OPERAT'L SERVS. *supra* note 17, at 4–6; *OSD Guidance*, MASS. OPERAT'L SERVS. DIV., <http://www.mass.gov/anf/budget-taxes-and-procurement/procurement-info-and-res/conduct-a-procurement/osd-policies-regs/osd-policy.html> (last visited Jan. 3, 2015).

<sup>57</sup> MASS. OPERAT'L SERVS. DIV., *supra* note 17, at 4–6

Business Purchasing Program (SBPP)—are housed within the Supplier Diversity Office (SDO) of OSD. Agencies must also comply with a nutrition standards requirement established by Executive Order 509 (E.O. 509), which is overseen by a working group lead by the Department of Public Health (DPH).

### **Local Government Procurement**

As a complementary provision to Section 23B's locally-grown food procurement preference, in 2006, the legislature also amended Massachusetts' *local* government procurement law to exclude small contracts with in-state farms from its bid solicitation requirement.<sup>1</sup> Usually, local governmental bodies, such as cities, towns, counties, and school districts, must seek price quotes from at least three interested parties.<sup>2</sup> Under this exemption, for contracts valued at less than \$25,000, procurement agents may award contracts to "Massachusetts farm operations" without seeking more than one price quote, provided that the agent follows "sound business practices," meaning that the agent periodically solicits price quotes from vendors to ensure that the entity is receiving goods at a "reasonable" price.<sup>3</sup> This carve-out effectively allows school districts, as well as cities and towns, to enter into small sole-source contracts for local agricultural products without requiring other justifying circumstances that normally would be required under the formal bid solicitation process.<sup>4</sup> Unfortunately, the local government law does not currently apply to state agencies, and therefore agencies cannot take advantage of this small farm contract exception.<sup>5</sup>

<sup>1</sup> Economic Investments, H.R. 5057, 184th Gen. Ct. (Mass. 2006) (codified as amended at MASS. GEN. LAWS ANN. ch. 30B, § 4(d) (West 2013)). The Uniform Procurement Act, Massachusetts General Laws, Chapter 30B, applies only to local governmental bodies, not state agencies. See MASS. OFFICE OF THE INSPECTOR GEN., THE CHAPTER 30B MANUAL: LEGAL REQUIREMENTS, RECOMMENDED PRACTICES, AND SOURCES OF ADVICE FOR PROCURING SUPPLIES, SERVICES, AND REAL PROPERTY 2 (2011), available at <http://www.mass.gov/ig/publications/manuals/30bmanl.pdf>.

<sup>2</sup> MASS. GEN. LAWS ANN. ch. 30B, § 4(a) (West 2013).

<sup>3</sup> *Id.* at § 4(d); MASS. OFFICE OF THE INSPECTOR GEN., THE CHAPTER 30B MANUAL: LEGAL REQUIREMENTS, RECOMMENDED PRACTICES, AND SOURCES OF ADVICE FOR PROCURING SUPPLIES, SERVICES, AND REAL PROPERTY 4 (2011), available at <http://www.mass.gov/ig/publications/manuals/30bmanl.pdf>.

<sup>4</sup> For the procurement of other goods and services, agencies may not enter into sole source contracts unless they have undertaken a "reasonable investigation" and have determined and certified in writing that "only one practicable source" exists. MASS. GEN. LAWS ANN. ch. 30B, § 7(a) (West 2013).

<sup>5</sup> MASS. OFFICE OF THE INSPECTOR GEN., THE CHAPTER 30B MANUAL: LEGAL REQUIREMENTS, RECOMMENDED PRACTICES, AND SOURCES OF ADVICE FOR PROCURING SUPPLIES, SERVICES, AND REAL PROPERTY 4 (2011), available at <http://www.mass.gov/ig/publications/manuals/30bmanl.pdf>.

#### **a. Small Business Purchasing Program**

The purpose of the SBPP is to support and encourage the growth of small businesses in Massachusetts by directing state agencies to give "special consideration" in their procurement practices to small

<sup>58</sup> *Supplier Diversity Office*, OPERAT'L SERVS. DIV., <http://www.mass.gov/anf/budget-taxes-and-procurement/procurement-info-and-res/procurement-prog-and-serv/sdo/> (last visited Dec. 27, 2014).

businesses enrolled in the program.<sup>59</sup> E.O. 523 applies to the procurement of non-construction commodities and services by “all state agencies of the Executive Department,” which includes “all executive offices, boards, commissions, departments, divisions, councils, bureaus, offices” and other new and currently existing agencies.<sup>60</sup> All eighty-two agencies within Massachusetts’ executive branch must comply with E.O. 523.<sup>61</sup>

Small procurements—those valued between \$10,000 and \$150,000—must be awarded to qualified bids from SBPP participants.<sup>62</sup> Non-SBPP bidders may also bid on these small contracts, but they will receive an award only if no SBPP-participating bidder submits a response that meets contract requirements.<sup>63</sup>

The SBPP defines a “small business” as “[a]ny entity, including all of its affiliates combined” that:

- (1) Has its principal place of business in Massachusetts;*
- (2) Has been in business for at least one year;*
- (3) Currently employs a combined total of fifty or fewer full-time equivalents in all locations;*
- (4) Has gross revenues as reported on the appropriate IRS tax form of \$15 million or less, based on a 3-year average; and*

*EITHER*

*a) For any “For-Profit” Business Type:*

- i. Is organized under the laws of the Commonwealth or is properly registered to do business in the Commonwealth; and*
- ii. Is independently owned and operated.*

*OR*

*b) For any “Non-Profit” (i.e. 501(c)) Business Type:*

- i. Is registered as a nonprofit or charitable organization and up to date on its filings with the Massachusetts Attorney General’s Office; and*
- ii. Is tax-exempt under Section 501(c) of the Internal Revenue Code, i.e. organized and operated exclusively for exempt purposes set forth in section 501(c) and none of its earnings may inure to any private shareholder or individual.<sup>64</sup>*

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<sup>59</sup> Mass. Exec. Order No. 523, *supra* note 23.

<sup>60</sup> *Id.*

<sup>61</sup> MASS. OPERAT’L SERVS. DIV., *supra* note 17, at 9.

<sup>62</sup> *OSD Policy Guidance 14-01: OSD/CTR Revised Incidental Purchase Limit, New Due Diligence Posting Requirements, and Revised Procedures for Using Cooperative Purchasing Contracts Issued by Non-Massachusetts Public Entities*, MASS. OPERAT’L SERVS. DIV. 2 (2013), available at <http://www.mass.gov/anf/budget-taxes-and-procurement/procurement-info-and-res/conduct-a-procurement/osd-policies-regs/osd-policy.html> (last visited Jan. 3, 2015). Prior to 2011, when OSD revised its policies in light of E.O. 523, procurement teams were only required to give a 10% price preference to SBPP participants for small procurements; under the new regulations, however, OSD requires an absolute preference for bids below \$150,000, provided the bidder can meet contract specifications. MASS. OPERAT’L SERVS. DIV., *supra* note 17, at 21–22.

<sup>63</sup> MASS. OPERAT’L SERVS. DIV., *supra* note 17, at 21.

<sup>64</sup> MASS. OPERAT’L SERVS. DIV., SUPPLIER DIVERSITY OFFICE: COMPREHENSIVE ANNUAL REPORT FY2012 42 (2012), available at <http://www.mass.gov/anf/docs/osd/sdo/forms/fy2012sdo-annual-report.pdf> (last visited Apr. 24, 2015).

OSD is the state agency responsible for overseeing the SBPP. OSD must “actively promote” the SBPP and provide technical assistance, outreach, and training to small businesses.<sup>65</sup> This ensures that the small business owners and operators understand Massachusetts’ procurement processes and the online COMMBUYS bidding system.<sup>66</sup> Through an OSD-developed system in COMMBUYS, small businesses can enter information into a database to determine eligibility and enroll in the SBPP.<sup>67</sup> OSD has the authority to audit these submissions and assess penalties against any business that misrepresents its status as a small business.<sup>68</sup>

To track the success of the SBPP, OSD is required to measure each state agency’s spending on goods and services provided by small businesses through different activities.<sup>69</sup> E.O. 523 instructs OSD to develop policies that require specific procurements, or portions of procurements, to be targeted toward small businesses.<sup>70</sup> Each year, OSD must work with state agencies and other officials to set benchmarks for the upcoming fiscal year’s small business expenditures amount.<sup>71</sup> OSD must prepare an annual report to the Secretary of the Executive Office for Administration and Finance discussing the program’s effectiveness, including an account of the total dollars spent on small business goods and services, the number of participants in the SBPP, and outreach and training efforts of the SBPP.<sup>72</sup>

Although the SBPP is located within OSD,<sup>73</sup> each agency must designate one of its employees as a “small business liaison.”<sup>74</sup> The liaison coordinates with OSD to support, monitor, and enforce the policies of the SBPP within his or her own agency.<sup>75</sup> State agencies must also make sure to input the small business designation for each purchase into the Massachusetts online accounting system, which allows OSD to track small business expenditures by each agency.<sup>76</sup>

Prior to 2011, agency procurement teams were only required to give a 10% price preference to SBPP participants for contracts valued between \$50,000-\$150,000; now, OSD requires an absolute preference, provided the bidder can meet contract specifications.<sup>77</sup> Procurement teams are also encouraged, but not required, to award large procurements, valued at greater than \$150,000, to SBPP participants.<sup>78</sup>

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<sup>65</sup> Mass. Exec. Order No. 523, *supra* note 23.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> MASS. OPERAT’L SERVS. DIV., *supra* note 64, at 42.

<sup>74</sup> Mass. Exec. Order No. 523, *supra* note 23.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> MASS. OPERAT’L SERVS. DIV., *supra* note 17, at 21.

<sup>78</sup> *Id.*

The SBPP has grown significantly since its inception in 2010. In FY 2011, OSD reported that expenditures through the program totaled \$59.7 million.<sup>79</sup> By FY 2012, expenditures through the SBPP had more than doubled to \$121.79 million, spent by seventy-two state agencies.<sup>80</sup> In FY 2013, spending with SBPP participants decreased slightly to \$121.74 million (a decrease of less than \$50,000).<sup>81</sup> Participant numbers in the SBPP have increased as well. In FY 2011, there were 1,852 SBPP participants; the number of participants increased to 2,600 by the end of FY 2012 (a 40% increase).<sup>82</sup> In FY 2013, the number of participants in the SBPP grew to 2,906 (an 11.7% increase).<sup>83</sup> State agency food-related expenditures through the SBPP, however, were extremely low in FY 2012, at only \$6,368, representing less than 1% of total spending through the program.<sup>84</sup> The breakdown of agency spending through the SBPP was not available in the FY 2013 annual report.

**Figure 1. State Agency Spending on SBPP Participant Goods and Services<sup>85</sup>**

FY 2011	FY 2012	FY 2012 Increase over FY 2011
\$59,693,832	\$121,790,070	\$62,096,238

FY 2012	FY 2013	FY 2013 Decrease over FY 2012
\$121,790,070	\$121,741,368	(\$48,701.57)

For FY 2013, OSD set a benchmark for state agency spending through the SBPP at 2.5% of the total annual discretionary budget.<sup>86</sup> In FY 2013, the Executive Department agencies exceeded the benchmark for spending with SBPP participants, spending nearly 3% of their discretionary budget through the SBPP.<sup>87</sup>

**Figure 2. FY 2013 SBPP Benchmark<sup>88</sup>**

FY 2013 Total Program Discretionary Budget	FY 2013 SBPP Benchmark (2.5% of Discretionary Budget)	SBPP FY 2013 Overall Expenditure	SBPP Spending as a % of Discretionary Budget Benchmark
\$4,072,869,113	\$101,821,728	\$121,741,368	119.62%

<sup>79</sup> MASS. OPERAT'L SERVS. DIV., *supra* note 64, at 42–43.

<sup>80</sup> *Id.*

<sup>81</sup> The decrease was \$48,701.57 in FY 2013. MASS. OPERAT'L SERVS. DIV., SUPPLIER DIVERSITY OFFICE: COMPREHENSIVE ANNUAL REPORT FY2013 19 (2014), available at <http://www.mass.gov/anf/docs/osd/sdo/forms/fy2013sdofinalannualreport.pdf> (last visited Dec. 27, 2014).

<sup>82</sup> MASS. OPERAT'L SERVS. DIV., *supra* note 64, at 50.

<sup>83</sup> MASS. OPERAT'L SERVS. DIV., *supra* note 81, at 19.

<sup>84</sup> MASS. OPERAT'L SERVS. DIV., *supra* note 64, at 48.

<sup>85</sup> *Id.* at 43; MASS. OPERAT'L SERVS. DIV., *supra* note 81, at 19.

<sup>86</sup> MASS. OPERAT'L SERVS. DIV., *supra* note 81, at 19.

<sup>87</sup> MASS. OPERAT'L SERVS. DIV., *supra* note 81, at 19.

<sup>88</sup> *Id.*

Currently, there do not seem to be any farmers participating in the SBPP;<sup>89</sup> however, nothing in the SBPP would prohibit farmers from joining. There is already a produce distributor based out of Everett listed in the SBPP directory; it is unclear how much of the produce is sourced locally, but there is mention of at least one locally sourced product (Kabocha squash).<sup>90</sup>

### ***b. Supplier Diversity Program***

For large procurements (those over \$150,000), bidders must include in their responses any plans to include minority-owned and women-owned firms as part of Massachusetts' Supplier Diversity Program (SDP).<sup>91</sup> When evaluating a bidder's response, procurement teams are required to dedicate at least 10% of the evaluation points to weighing the relative strength of each bidder's SDP plan.<sup>92</sup>

Each Executive Branch department has an SDP liaison that "is responsible for tracking participating departments' procurement expenditures with certified M/WBE [Minority and Women Business Enterprises]." <sup>93</sup> Executive Branch departments are required to set yearly spending targets, called benchmarks, with certified M/WBE. <sup>94</sup> These benchmarks are tracked and reported in the SDP Fiscal Year Report. <sup>95</sup> In FY 2013, the benchmarks were 6% for minority business enterprises and 12% for women business enterprises; Massachusetts agencies did not reach the minority business enterprise benchmark, but exceeded the women business enterprise benchmark in FY 2013. <sup>96</sup>

The SDO maintains a directory of certified M/WBE businesses; a search through the list shows forty-nine businesses that fall under the "Food & Groceries" industry categories. <sup>97</sup> Of those forty-nine certified M/WBE businesses, only a few indicate that they provide produce. <sup>98</sup> For example, Lun Fat Produce, Inc. sells vegetables, produce, and fruit. <sup>99</sup> Tending the Wild CSA is a community supported agriculture farm that provides "specialty food crops (including fruits, nuts and berries); and agricultural research, consulting, and education services." <sup>100</sup> There is also at least one produce distributor (IBS Commodities, Inc.). <sup>101</sup> Aside from Tending the Wild CSA, there do not appear to be any other farmers participating in the SDP.

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<sup>89</sup> Preliminary search of COMMBUY's business directory did not reveal any farms or agricultural businesses designated as SBPP participants. See *Business Directory*, COMMBUYS, <https://www.commbuys.com/bso/external/registeredVendorSearch.sdo> (select SBPP participant box at bottom of search criteria) (last visited Dec. 27, 2014).

<sup>90</sup> *Id.*; HOLDEN FRUIT & PRODUCE, INC., <http://www.holdenproduce.com/content/new-products> (last visited Dec. 27, 2014).

<sup>91</sup> MASS. OPERAT'L SERVS. DIV., *supra* note 17, at 21.

<sup>92</sup> *Supplier Diversity Program*, MASS. OPERAT'L SERVS. DIV. 1 (2013), available at [www.mass.gov/anf/docs/osd/pic/sdp.doc](http://www.mass.gov/anf/docs/osd/pic/sdp.doc) (last visited Jan. 3, 2015).

<sup>93</sup> *Supplier Diversity Program*, MASS. OPERAT'L SERVS. DIV., THE SUPPLIER DIVERSITY OFFICE, <http://www.mass.gov/anf/docs/osd/sdo/sdp/brochure.pdf> (last visited Dec. 27, 2014).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> MASS. OPERAT'L SERVS. DIV., *supra* note 81, at 16.

<sup>97</sup> *Directory of Certified Businesses Search*, MASS. OPERAT'L SERVS. DIV., THE SUPPLIER DIVERSITY OFFICE <https://www.sdo.osd.state.ma.us/BusinessDirectory/BusinessDirectory.aspx> (under Search Criteria, drill down under "Industry Category" and select "Food & Groceries – Related Equipment, Personnel, Services & Supplies") (last visited Dec. 27, 2014).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

### ***c. Executive Order 509: Nutrition Standards for Food Purchased and Served by State Agencies***

Agencies procuring food must also comply with Executive Order 509 (E.O. 509). On January 7, 2009, in recognition of the growing concerns over diet-related health issues, Governor Deval Patrick signed E.O. 509 establishing nutrition standards for food purchased by state agencies after July 1, 2009.<sup>102</sup> E.O. 509 notes the health impacts of increasing rates of obesity in Massachusetts due to low consumption of fruits and vegetables, and recognizes the state's opportunity to promote healthy eating habits through leading by example.

The text of E.O. 509 indicates that it applies to all state agencies in the Executive Department that provide food as part of their basic services to clients or patients.<sup>103</sup> It does not apply to vending machines or other independent concessions that offer food for sale, to purchases of food served to employees, or to purchases of food for occasional events.<sup>104</sup> As per E.O. 509, DPH identified nine agencies that provide food as part of their basic services (the same nine discussed in this report).<sup>105</sup>

DPH was also tasked with establishing the nutritional guidelines for these agency food purchases.<sup>106</sup> DPH nutritional standards include requirements for these agencies to:

- increase whole grains;
- increase fruits and vegetables—preferably locally grown;
- use lean cuts of meat and poultry;
- use alternative protein sources (e.g., rice and beans and legumes); and
- use skim/non-fat dairy.<sup>107</sup>

The standards, however, are merely a baseline, and agencies are “encouraged to support emerging practices” that may enhance the health of the population served.<sup>108</sup> DPH encourages each agency to

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<sup>102</sup> Mass. Exec. Order No. 509 (Jan. 7, 2009), <http://www.mass.gov/governor/legislationeeexecorder/executiveorder/executive-order-no-509.html> (last visited Jan. 3, 2015).

<sup>103</sup> *Id.*; MASS. DEP'T PUB. HEALTH, EXECUTIVE ORDER 509: ESTABLISHING NUTRITION STANDARDS FOR FOOD PURCHASED AND SERVED BY STATE AGENCIES 1 (2011), *available at* <http://www.mass.gov/eohhs/docs/dph/com-health/nutrition-phys-activity/eo509-qa.pdf> (last visited Jan. 3, 2015).

<sup>104</sup> MASS. DEP'T PUB. HEALTH, *supra* note 103, at 1–3.

<sup>105</sup> Mass. Exec. Order No. 509, *supra* note 102. The nine agencies are: Department of Developmental Services; Department of Youth Services; Department of Public Health; Department of Mental Health; Department of Correction; Sheriffs' Offices; Executive Office of Elder Affairs; Department of Children and Families; and Department of Veterans' Services. MASS. DEP'T PUB. HEALTH, HELPING RESIDENTS EAT BETTER WITH EXECUTIVE ORDER 509 (2011), *available at* <http://www.mass.gov/eohhs/docs/dph/mass-in-motion/ss-eo509.pdf> (last visited Jan. 3, 2015); *see also* BAYERL, *supra* note 11, at 2. Eight of the agencies follow the Massachusetts Nutrition Guidelines, which were established under Executive Order (509) *Establishing Nutrition Standards for Food Purchased and Served by State Agencies*. The Executive Office of Elder Affairs has elected to follow age specific federal nutrition standards and monitoring system. Both nutrition standards are based on the Dietary Guidelines for Americans. Email from Cynthia Bayerl, Nutrition Coordinator, Mass. Dep't of Public Health (April 9, 2015) (on file with the author).

<sup>106</sup> Mass. Exec. Order No. 509, *supra* note 102.

<sup>107</sup> MASS. DEP'T PUB. HEALTH, *supra* note 103, at 1. *See* MASS. DEP'T PUB. HEALTH, MASSACHUSETTS STATE AGENCY FOOD STANDARDS: REQUIREMENTS AND RECOMMENDATIONS (2012), *available at* <http://www.mass.gov/eohhs/docs/dph/com-health/nutrition-phys-activity/eo509-state-agency-food-standards.pdf> (last visited Jan. 4, 2015) (providing a full listing of DPH's proposed standards).

<sup>108</sup> MASS. DEP'T PUB. HEALTH, *supra* note 103, at 1. To finalize these standards, DPH assembled an Advisory Workgroup and invited participation by key representatives of those agencies impacted by E.O. 509. BAYERL, *supra* note 11, at 4; MASS. DEP'T PUB. HEALTH, *supra* note 105.

designate an employee within the agency to oversee implementation of E.O. 509,<sup>109</sup> and OSD has included language in the standard agency RFR document indicating that all Executive Department agency food purchases must comply with nutritional guidelines established by E.O. 509.<sup>110</sup>

## ***E. Statewide v. Agency Specific Food Contracts***

There are two main types of procurement contracts: statewide contracts and agency-specific contracts. Procurement methods for both statewide and agency-specific contracts are set forth through regulations promulgated by OSD.<sup>111</sup> Goods available through statewide contracts range from copy paper and other office supplies to vehicles, building materials, medical supplies, and food products.<sup>112</sup> Food products, however, are treated a bit differently than other goods. There are three statewide food contracts procured by OSD: prime grocer, dairy, and baked goods. Individual state agencies can then establish additional food contracts for use only by their agency (i.e., not statewide). Some agencies order primarily from the statewide contracts and some manage their own food purchase contracts.

### **1. Statewide Contracts**

Statewide contracts—those procured on behalf of all state agencies—are established and managed by OSD, unless OSD designates another agency to conduct the particular procurement.<sup>113</sup> The duration of a statewide contract is typically one to two years, with several options to renew the contract.<sup>114</sup> Statewide food contracts harness collective buying power to achieve bulk discounts from large-scale contractors. Currently, Massachusetts has three statewide food contracts: the prime grocer contract (produce), the milk and dairy contract, and the baked goods contract. Agencies wishing to purchase through one of these three statewide contracts can access current food offerings through Massachusetts' online procurement website, COMMBUYS. Following is a description of the three statewide food contracts.

#### ***a. The Statewide Prime Grocer Contract***

With an estimated value of \$13 million annually,<sup>115</sup> Massachusetts' largest state agency food contract is the statewide prime grocer contract. The contract serves all state agencies and is available to all other public entities within Massachusetts, such as the legislative and judicial branches, state colleges and universities, as well as local towns and municipalities.<sup>116</sup> The prime grocer contract covers groceries and food products such as fresh and processed produce, canned goods, cereals, meats, frozen foods, pasta,

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<sup>109</sup> McAvoy, *supra* note 23.

<sup>110</sup> *Id.*

<sup>111</sup> 801 MASS. CODE REGS. 21.00 (2013); *see also* MASS. GEN. LAWS ANN. ch. 7 § 22 (West 2013).

<sup>112</sup> *See Statewide Contract User Guides*, MASS. OPERAT'L SERVS. DIV., available at <http://www.mass.gov/anf/budget-taxes-and-procurement/procurement-info-and-res/buy-from-a-state-contract/statewide-contract-user-guides.html> (last visited Jan. 4, 2015).

<sup>113</sup> 801 MASS. CODE REGS. 21.04 (2013).

<sup>114</sup> *See Statewide Contract User Guides*, *supra* note 112.

<sup>115</sup> MASS. OPERAT'L SERVS. DIV., REQUEST FOR RESPONSE: PRIME GROCER—GRO-30 2 (2012), <https://www.commbuys.com> (click on the "Contract & Bid Search" link, select "Contracts/Blankets," input "C138617-vCurrent" into Contract/Blanket # box and click "Find It," click the "C138617-vCurrent" link, in the list of agency attachments click "GRO30RFRFinal") (last visited Jan. 4, 2015).

<sup>116</sup> *Id.* at 1.

and specialty foods.<sup>117</sup> In 2012, the Department of Correction (DOC) accounted for the majority of agency spending through the prime grocer contract (55%, or over \$9.5 million), followed by the Sheriff's Department (15%), the Department of Youth Services (11%), Soldier's Homes in Chelsea and Holyoke (10%), with various other departments making much smaller purchases (see Figure 3).<sup>118</sup>

OSD handles the procurement process for this contract, with input from a procurement team consisting of eight representatives, mostly from the DOC but also from DPH and the Massachusetts Emergency Management Agency.<sup>119</sup> The 2012 RFR for the prime grocer contract informed bidders that the contract aims to promote the purchase of locally grown products and "nutritional, pesticide free produce wherever possible," in accordance with Massachusetts laws and directives.<sup>120</sup> The RFR required bidders to provide competitively priced organic counterparts to conventional fruit and vegetable for items classified by the Environmental Working Group as having the highest pesticide residue.<sup>121</sup> It also requested (but did not require) that bidders partner with smaller-scale farmers or certified organic growers to offer some "sustainably grown" products.<sup>122</sup>

Because the prime grocer contract is so large, and contains many different food products to serve multiple agencies' needs, each of the three main vendors on the prime grocer contract—US Foods, Performance Food Group, and Reinhart—subcontracts with a variety of smaller food suppliers to provide certain foods under the contract. For example, US Foods purchases frozen broccoli from Monarch, but purchases beans from El Pasado.<sup>123</sup> Appendix F: July 2014 Food Order Guides contains a list of products available from the July 2014 food order guides from the three main vendors listed above. As illustrated by the list in Appendix F, there is a wide range of products procured under the prime grocer contract. This statewide contract includes food products that both can be sourced locally (e.g., tomatoes, potatoes, and corn) and those that cannot be sourced locally (e.g., mango, pineapples, avocados). Because the contract requests both locally available and not locally available produce, it is more difficult for local producers and aggregators to meet the contract requirements, thus excluding these local producers and aggregators from competing for and winning the contract.

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<sup>117</sup> *Id.* The current contract's effective date is January 1, 2013, and runs until December 31, 2015, with three options to renew for an additional year. *See id.*

<sup>118</sup> *See* MASS. OPERAT'L SERVS. DIV., GRO14 PRIME GROCER: FISCAL YEAR 2012 SPEND (EXECUTIVE AGENCIES) (report generated Mar. 6, 2013) (on file with the author).

<sup>119</sup> *See* MASS. OPERAT'L SERVS. DIV., C138617-vCURRENT OD.XLSX (2012), *available at* <https://www.commbuys.com> (click on the "Contract & Bid Search" link, select "Contracts/Blankets," input "C138617-vCurrent" into Contract/Blanket # box and click "Find It," click the "C138617-vCurrent" link, in the list of agency attachments click "C138617-vCurrent OD.xlsx", then in the POHeader sheet find column AR for "Additional Team Members") (last visited Jan. 4, 2015).

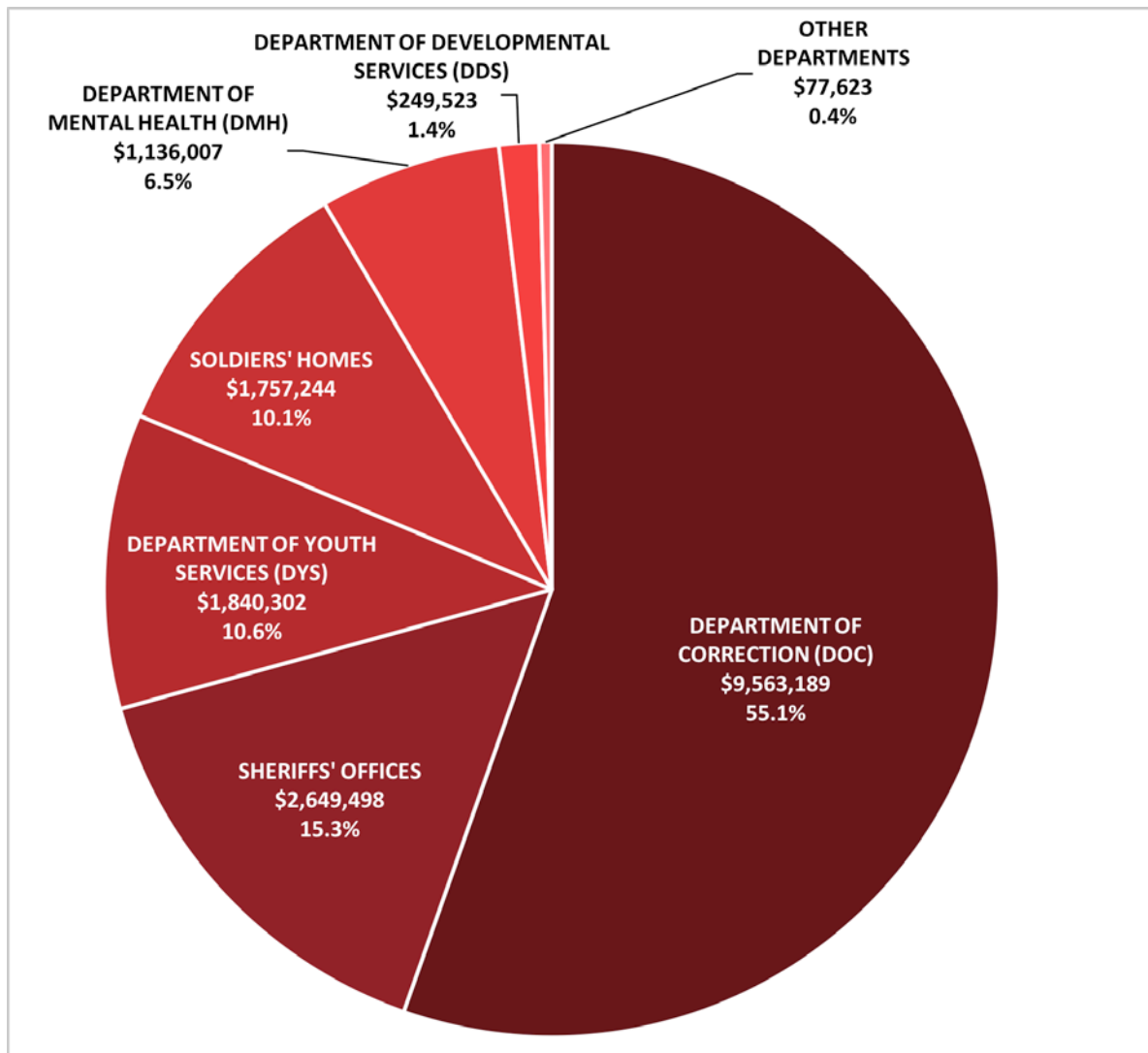
<sup>120</sup> MASS. OPERAT'L SERVS. DIV., *supra* note 115, at 1.

<sup>121</sup> MASS. OPERAT'L SERVS. DIV., *supra* note 115, at 5.

<sup>122</sup> *Id.* at 22.

<sup>123</sup> On file with the author.

Figure 3. Agency Spend on Prime Grocer Contract, FY 2012<sup>124</sup>



### ***b. The Statewide Dairy Contract***

The next biggest contract after the prime grocer contract is the statewide dairy contract, valued at \$5 million,<sup>125</sup> which covers products such as milk, juices, cheese, cream cheese, ice cream, butter, and margarine.<sup>126</sup> In FY 2012, the DOC accounted for the majority of expenditures through the dairy contract (56% or \$1.4 million), followed by the sheriffs' offices (19.7%), the Soldiers' Homes in Chelsea and Holyoke (8.4%), the Department of Mental Health (5.5%), and the Department of Children and Families

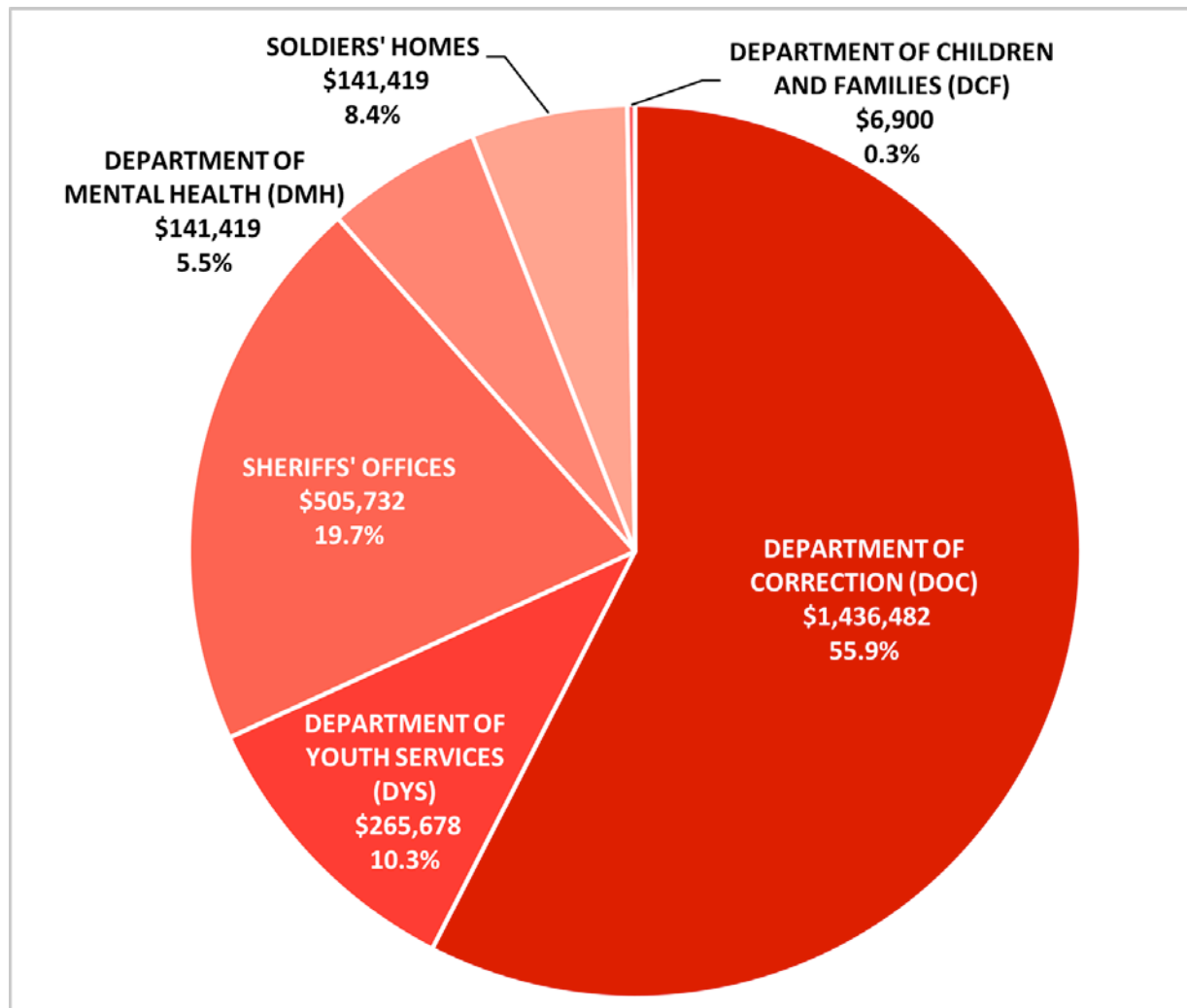
<sup>124</sup> See *id.*

<sup>125</sup> MASS. OPERAT'L SERVS. DIV., REQUEST FOR RESPONSE: DAIRY PRODUCTS—GRO-32 2 (2012), available at <https://www.commbuys.com> (click on the "Contract & Bid Search" link, select "Contracts/Blankets," input "C145492-vCurrent" into Contract/Blanket # box and click "Find It," click the "C145492-vCurrent" link, in the list of agency attachments click "GRO32RFRFinal") (last visited Jan. 4, 2015).

<sup>126</sup> *Id.* at 1.

(0.3%).<sup>127</sup> Current vendors on the contract are Garelick Farms and Rosev Dairy Foods.<sup>128</sup> Garelick, like most processors in the fluid milk industry, sources from regional dairy farms,<sup>129</sup> while the Rosev's website does not specify from where it sources its fluid milk.

**Figure 4. Agency Spend on Dairy Contract, FY 2012**<sup>130</sup>



### ***c. The Statewide Baked Goods Contract***

There is also a statewide contract for baked goods, such as bread, danishes, bagels, and English muffins.<sup>131</sup> The contract is valued at \$2 million<sup>132</sup> and the sole vendor under the contract is Orograin

<sup>127</sup> MASS. OPERAT'L SERVS. DIV., GRO32 DAIRY PRODUCTS: FISCAL YEAR 2012 SPEND (EXECUTIVE AGENCIES) (report generated April 16, 2013) (on file with the author).

<sup>128</sup> *Master Blanket Purchase Order C145492-vCurrent*, COMMBUYS, <https://www.commbuys.com> (click on the "Contract & Bid Search" link, select "Contracts/Blankets," input "C145492-vCurrent" into Contract/Blanket # box and click "Find It," click the "C145492-vCurrent" link) (last visited Jan. 4, 2015).

<sup>129</sup> *About Us*, GARELICK FARMS, <http://www.garelickfarms.com/about> (last visited Jan. 4, 2015) ("Garelick Farms supports over 1,000 local farms throughout Massachusetts, Rhode Island, New Hampshire, Connecticut, Vermont, Maine and upstate New York.").

<sup>130</sup> See MASS. OPERAT'L SERVS. DIV., *supra* note 127.

Bakeries Sales, located in Albany, New York.<sup>133</sup> Because baked goods are not covered by Section 23B, research was not focused on this statewide contract.

## 2. Agency-Specific Contracts

Agencies must purchase goods and services through existing statewide contracts “100% of the time,” unless granted an exemption from OSD.<sup>134</sup> There are two ways agencies can purchase under an agency-specific contract. First, an agency can request an exemption from a statewide contract if the statewide contract does not meet its business requirements and the agency believes it is necessary to issue a separate RFR.<sup>135</sup> In that case, the agency must seek approval from OSD by explaining in detail the inadequacy of the existing statewide contract and estimating the anticipated procurement duration and value.<sup>136</sup> OSD reviews and tracks these requests, granting or denying approval within ten days of receipt of the request.<sup>137</sup> Second, if a statewide contract does not already exist, an agency may initiate its own procurement process, but OSD encourages agencies to determine first whether another agency has a similar active contract from which additional agencies may place orders.<sup>138</sup>

Agencies with individual contracts thus have either been granted exemptions from OSD to issue separate contracts, or the specific produce sought is not considered equivalent to the produce available through the prime grocer contract (most of which is frozen, canned, or precut). Department of Children and Families, DOC, and Department of Developmental Services have each developed their own contracts for food purchases.

## IV. CHALLENGES TO LOCAL PROCUREMENT

Although Section 23B requires that state agencies purchase locally grown food if it is not more than 10% more expensive than food grown outside of Massachusetts, it appears that very little local procurement is occurring at state agencies. Section III introduced and discussed the processes and requirements for procuring food for state agencies, and referenced some of the overarching challenges and barriers to increasing local procurement by state agencies. This section identifies and discusses in more detail those overarching challenges and barriers agencies face in procuring local food. Then, Section V includes recommendations for addressing the overarching challenges and barriers to achieving Section 23B’s goal.

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<sup>131</sup> MASS. OPERAT’L SERVS. DIV., REQUEST FOR RESPONSE: BAKED GOODS—GRO-33 1 (2012), available at <https://www.commbuys.com> (click on the “Contract & Bid Search” link, select “Contracts/Blankets,” input “C157532-vCurrent” into Contract/Blanket # box and select “Include Expired” and then click “Find It,” select the “C157532-vCurrent” link, in the list of agency attachments click “GRO33BakedGoodsRFR”) (last visited Jan. 4, 2015).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> MASS. OPERAT’L SERVS. DIV., *supra* note 17, at 19.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 26 (outlining applicable competitive procurement requirements for non-statewide contract procurements).

## 1. Lack of Information about Section 23B

It appears that agencies are not provided much information about Section 23B that would assist them in complying with the statute. OSD has created numerous materials explaining and encouraging participation in the SBPP and SDP. There are no similar materials for Section 23B. Although agency purchasers all likely know about Section 23B, there are not a lot of supporting materials that could help agency food purchasers increase their local food purchases.

## 2. Lack of Incentive to Comply with Section 23B

Section 23B's wording and guidance documents contribute to some of the challenges. Although Section 23B requires that Massachusetts state agencies purchase locally produced food if it is not more than 10% more expensive than out-of-state food,<sup>139</sup> OSD's guidance documents indicate that agencies will be in compliance with Section 23B's "reasonable efforts" requirements so long as they include certain contract language in their solicitation for bids.<sup>140</sup> It appears that no other action by the agency is required to be in compliance with Section 23B.<sup>141</sup> This is a low bar for compliance and gives agencies little incentive to either seek out vendors of locally grown food or to demonstrate actual purchasing of locally grown food.

## 3. Lack of Data about Compliance

There is no explicit requirement, either in Section 23B or in OSD's guidance documents, that an agency request information from bidders about their local procurement purchasing practices other than their affirmation that they made "reasonable efforts" to procure local food products. The result is that when an agency puts out a bid for a food contract, bidders can submit responses without disclosing whether or not they supply locally grown food. This causes two major gaps in data that if collected could help agencies comply with Section 23B. First, this lack of data results in an inability to apply the preference, if applicable; second, it means that there is no way to track how much local food is being purchased.

Without this information, the agency is left accepting bids that contain little or no information about the geographic origin of these foods. If bidders are not required to disclose from where their products are sourced, the agency cannot determine whether to apply the 10% price preference for local foods called for under Section 23B. This information gap thwarts full implementation of Section 23B—an agency cannot prefer locally grown food when bidders do not account for which of their products, if any, are grown locally.

To illustrate this issue, consider a recent RFR for the prime grocer contract. The prime grocer RFR included the standard language regarding Section 23B's local purchasing requirements:

*Chapter 123 of the Acts of 2006 directs the State Purchasing Agent to grant a preference to products of agriculture grown or produced using locally grown products. Such locally*

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<sup>139</sup> MASS. GEN. LAWS ANN. ch. 7, § 23B(a) (West 2013).

<sup>140</sup> COMMUNITY INVOLVED IN SUSTAINING AGRICULTURE, *supra* note 39, at 9.

<sup>141</sup> *Id.*

*grown or produced products shall be purchased unless the price of the goods exceeds the price of products of agriculture from outside the Commonwealth by more than 10%.*<sup>142</sup>

The RFR response checklist requires bidders to submit a statement addressing compliance with the agricultural products preference law.<sup>143</sup> Although the checklist did not provide explicit instructions as to how bidders could demonstrate conformity with the law, it requested the names and locations of local farm suppliers from whom the bidders purchase.<sup>144</sup> The RFR indicated that these statements would be considered during the evaluation stage, but did not specify how much weight would be given to the company's local purchasing response, compared with all other criteria under consideration, such as price of goods, company experience, and financial stability.<sup>145</sup> In contrast, the RFR stated that the SDP would be given a minimum of 10% weight, demonstrating that OSD could assign a specific weight to locally grown food considerations but had not done so.<sup>146</sup>

After bids were received and evaluated, OSD awarded the contract to four vendors: US Foods, Performance Food Group, Reinhart Foodservice, and Sysco Boston.<sup>147</sup> Sysco Boston has since been removed from the list of vendors. Of the three remaining vendors, only Performance Food Group answered "yes" to the question, "*Does your company contract with local Massachusetts farms to provide locally grown fruits and vegetables in season?*" and provided further information as requested.<sup>148</sup> Performance Food Group stated that in the spring of 2011, it "developed a relationship" with Franklin County Community Development Corporation, located in Greenville, Massachusetts.<sup>149</sup> In terms of selling locally grown food, Performance Food Group noted that it had the opportunity to sell through its distribution system,<sup>150</sup> and to some schools in Massachusetts, locally grown produce that was processed and frozen at the Franklin County Community Development Corporation.<sup>151</sup> Neither of the remaining two bidders indicated that it currently obtains food from Massachusetts farms.<sup>152</sup> When asked whether the vendor will contract with Massachusetts farms to provide locally grown produce in the future, Performance Food Group answered "yes," and stated that in 2013 it would

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<sup>142</sup> MASS. OPERAT'L SERVS. DIV., REQUEST FOR RESPONSE: PRIME GROCER—GRO-30 22 (2012).

<sup>143</sup> The checklist states: "Agricultural Products Preference must be addressed as instructed in RFR," but there are no instructions in the RFR, only a summary of the law itself, namely that the State Purchasing Agent must grant a 10% price preference to products grown within the state. See MASS. OPERAT'L SERVS. DIV., PRIME GROCERS GRO30: REQUEST FOR RESPONSE CHECK LIST (2012).

<sup>144</sup> The checklist states: "Agricultural Products Preference must be addressed as instructed in RFR," but there are no instructions in the RFR, only a summary of the law itself, namely that the State Purchasing Agent must grant a 10% price preference to products grown within the state. See MASS. OPERAT'L SERVS. DIV., *supra* note 143; MASS. OPERAT'L SERVS. DIV., *supra* note 142, at 22; MASS. OPERAT'L SERVS. DIV., PRIME GROCERS GRO30: BIDDERS RESPONSE FORM QUESTIONNAIRE – SECTION 1 (2012).

<sup>145</sup> MASS. OPERAT'L SERVS. DIV., *supra* note 142, at 21–22.

<sup>146</sup> *Id.*

<sup>147</sup> See *Active Contracts – GRO30*, COMMBUYS, <https://www.commbuys.com> (click on the "Active Contracts" tab, select "Food Beverage and Tobacco Products" under "Show Contracts for Category," see vendors for GRO30 contract) (last visited Jan. 3, 2015).

<sup>148</sup> Performance Food Group, Nutritional Standard Executive Order 509 Bidder's Response Sheet – Section 3 (on file with author).

<sup>149</sup> Performance Food Group, Locally Grown and Processed Vegetables (on file with author).

<sup>150</sup> Having "the opportunity to sell" locally-grown food through its distribution system means that Performance Group sold (or could have sold) locally grown food processed by Franklin County Community Development Corporation.

<sup>151</sup> Performance Food Group, *supra* note 149.

<sup>152</sup> US Foods, Nutritional Standard Executive Order 509 Bidder's Response Sheet – Section 3 (on file with author); Reinhart Foodservice, Nutritional Standard Executive Order 509 Bidder's Response Sheet – Section 3 (on file with author).

pursue doing business with two Massachusetts organic farms: Atlas Farm in Deerfield, Massachusetts, and Red Fire Farm in Granby, Massachusetts.<sup>153</sup> US Foods also answered “yes,” and stated that the company is “willing to work with local Massachusetts farms to provide locally grown fruits and vegetables provided that those farms meet the standards of US Foods regarding traceability and meet the insurance requirements [US Foods] currently ha[s] in place.”<sup>154</sup> US Foods indicated that it is able to track the amount of inventory being sourced from local farms at no charge to the customer, as its online order system can identify local products based on the farm’s distance from company facilities.<sup>155</sup> It is possible that the system can track products based on state of origin as well, which would allow OSD to determine whether purchased foods have been grown in Massachusetts, rather than within a certain distance parameter. Reinhart answered “no,” it will not be contracting with Massachusetts farms, and provided no further explanation.<sup>156</sup>

Reinhart also answered “no” to the question, “*Does your company comply with the Agricultural Products Preference requirement?*” (i.e., Section 23B).<sup>157</sup> Both US Foods and Performance Food Group answered “yes,” that they do comply with the Agricultural Products Preference requirement, assumingly because they both expressed a willingness to work with Massachusetts farms in the future, although they do not currently have business relationships with any farms in Massachusetts.<sup>158</sup>

Despite having these basic questions, agencies have no data on how much local food they are purchasing through the prime grocer contract. Without this information, it is impossible to establish a baseline quantity of local food purchases by agencies. It is possible that agencies are not buying any locally sourced product. Collecting this information is critical in finding ways to help agencies increase the amount of local food they procure.

**Figure 5. Answers to Prime Grocer Questions regarding Local Food Procurement**

	<i>Does your company contract with local Massachusetts farms to provide locally grown fruits and vegetables in season?</i>	<i>Will your company contract with Massachusetts farms to provide locally grown produce in season?</i>	<i>Does your company comply with the Agricultural Products Preference Requirement?</i>
Performance Food Group	Yes	Yes	Yes
US Foods	No	Yes	Yes
Reinhart	No	No	No

<sup>153</sup> Performance Food Group, *supra* note 148; Performance Food Group, Organic Produce (on file with author).

<sup>154</sup> US Foods, Prime Grocers GRO30 Request for Response (RFR) Bidders Response Form Questionnaire – Section 1 (on file with author); US Foods, *supra* note 152.

<sup>155</sup> US Foods, *supra* note 154.

<sup>156</sup> Reinhart Foodservice, *supra* note 152.

<sup>157</sup> Reinhart Foodservice, Prime Grocers GRO30 Request for Response (RFR) Bidders Response Form Questionnaire – Section 1 (on file with author).

<sup>158</sup> US Foods, *supra* note 154; Reinhart Foodservice, *supra* note 157.

#### 4. Lack of Participation in Existing Procurement Support Programs

Massachusetts has established two main procurement support programs to encourage agencies to purchase from identified groups of bidders. The SDP requires agencies to weigh bids from M/WBE more heavily to help these businesses secure agency contracts. The SBPP also encourages agencies to purchase from other small businesses that do not fall under the SDP. Both of these programs have a liaison in each Executive Department agency and each set benchmarks for agency purchasing through the program.

Despite the presence of these two programs, there is a dearth of participation by farmers and local food producers in these programs. Although participation in the SBPP has increased over the past couple years, there do not seem to be any farmers that are currently participating in the SBPP.<sup>159</sup> Additionally, there do not seem to be many farmers or food producers participating in the SDP. If the farmers meet the program criteria,<sup>160</sup> they should be able to participate in these programs.

#### 5. Prime Grocer Contract Requires Provision of Locally and Non-Locally Available Goods

The list of goods provided by vendors under the prime grocer contract includes a variety of products, from potatoes and corn, to mangoes, bananas, and oranges. Because of the wide range of products included in the prime grocer contract, local producers cannot supply all of the food products requested; however, local producers can supply many of the goods included on the contract. Such a contract excludes local producers from bidding on the contract, though local producers could be successful in bidding for a contract requiring a more narrow range of produce that grows in Massachusetts.

## V. RECOMMENDATIONS FOR INCREASING LOCAL FOOD PROCUREMENT BY MASSACHUSETTS AGENCIES

Despite the many challenges to local producers laid out above, there are also many opportunities for progress. This section identifies and discusses a number of recommendations for how advocates can help agencies increase local food procurement in Massachusetts and how agencies can better comply with Section 23B. Some of these recommendations can be achieved without any legislative or policy actions, while others will require such action. These recommendations are not mutually exclusive and will be more effective if used in combination with one another.

<sup>159</sup> See *Business Directory*, *supra* note 89.

<sup>160</sup> *Small Business Purchasing Program (SBPP)*, MASS. OPERAT'L SERVS. DIV., <http://www.mass.gov/anf/budget-taxes-and-procurement/procurement-info-and-res/sell-to-the-state/sbpp/> (last visited Apr. 3, 2015); *Supplier Diversity Program (SDP)*, MASS. OPERAT'L SERVS. DIV., <http://www.mass.gov/anf/budget-taxes-and-procurement/procurement-info-and-res/procurement-prog-and-serv/sdo/sdp/> (last visited Apr. 3, 2015).

## 1. Create Educational Materials about Section 23B for Agencies and Farmers.

Compliance with Section 23B's local food preference requires state agencies to be aware of the law and requires Massachusetts farmers to submit successful bids for agency food contracts. There are a few relatively straightforward actions advocates can take to educate agencies and farmers about Section 23B, and foster relationships between the two groups to facilitate purchasing of local food.

First, the Massachusetts Farm to School Project and other advocates can provide basic informational materials on farm-to-institution procurement to state procurement officials and farmers. There has been some progress made on this front. The Massachusetts Farm to School Project collaborated with the Department of Public Health in 2012 to create a fact sheet to help state agencies (particularly their community programs) improve their access to locally grown produce.<sup>161</sup> However, more education on local food procurement will be beneficial to agency purchasers and Massachusetts producers. Unlike the SBPP and SDP, there is little information about Section 23B on OSD's website. These other programs are promoted by OSD, with fact sheets, directories of qualified bidders, and other materials to help agencies comply with the programs. The Massachusetts Farm to School Project could help OSD craft educational materials to promote awareness of Section 23B and how to meet Section 23B's requirements. For example, it is possible that agency procurement officials are not purchasing local food products because of certain assumptions that could be easily dispelled (e.g., that there are no farmers with capacity to sell to agencies). A pamphlet with basic information about local procurement could list farmers across the state that are capable of selling to institutions and could include other resources upon which the agencies could rely when purchasing locally.

A second tactic is to host networking and informational sessions, bringing together state procurement agents with local farmers and aggregators.<sup>162</sup> For example, the Illinois Department of Agriculture, in connection with one of its county farm bureaus, has hosted "Meet the Buyers" events, where local farmers could meet with state purchasers to discuss the agencies' food needs and contract requirements.<sup>163</sup> Agency officials would benefit from this type of event because they would be able to learn about the local bounty available for purchase. Farmers would benefit by meeting agency purchasers, understanding what their demands are, and learning about ways to increase their marketability when selling to institutional purchasers, such as by obtaining Good Agricultural Practices (GAP) certification.<sup>164</sup>

In order for education and outreach efforts to have the greatest effect, advocates should consider encouraging OSD to take the following recommendations:

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<sup>161</sup> MASS. DEP'T OF PUB. HEALTH, CONNECTING STATE AGENCIES TO LOCALLY GROWN FOODS (2012), *available at* <http://www.mass.gov/eohhs/docs/dph/com-health/nutrition-phys-activity/eo509-farm-to-agency.pdf> (last visited Apr. 10, 2015).

<sup>162</sup> Aggregators are businesses that purchase food products from a number of local farmers, which can then be sold to larger institutional purchasers. These aggregator businesses help small- and mid-scale farmers access larger markets that they could not supply on their own.

<sup>163</sup> Press Release, *Meet the Buyers Event*, ILL. DEP'T OF AGRIC. (Feb. 18, 2013), *available at* <http://www.agr.state.il.us/newsrels/r0218131.html> (last visited Dec. 30, 2014).

<sup>164</sup> *Id.*

➤ ***Create a public directory of purchasing agents from each state agency.***

One of the difficulties in promoting local food procurement in Massachusetts is a lack of centralized, easily-accessible, and up-to-date information about the eighty-two agencies that purchase goods and services on behalf of the state. It is difficult for farmers to identify food procurers without undertaking an investigative analysis based on contacts listed on the COMMBUYS or the agency websites. Even with the contact information posted on COMMBUYS or the agency websites, farmers face a challenging time identifying the private individuals who are purchasing food at community homes and other agencies that have smaller food contracts.

A potential solution to reduce this information gap is to create an annual survey, distributed by the state, through which each state agency provides contact information for those employees at the agency—or individuals within each agency’s community sites—who have the authority to purchase food using state funds. For example, the Illinois Governor’s Office distributes this type of survey every year, which allows the Governor’s Office to collect this necessary contact information.<sup>165</sup> If Massachusetts develops a similar survey and records this information in an easy-to-find public database, it would facilitate many more connections between advocates, farmers, and procurement agents.

➤ ***Create a directory of Massachusetts farms and aggregators interested in selling to state agencies.***

Even if an agency is interested in purchasing locally grown food, it is difficult to determine which farms have the capacity to meet procurement requirements and the desire to contract with the state. State agency procurement officers may not know about opportunities to work with aggregators and that working with an aggregator could improve the logistical coordination of getting larger quantities of local food to state agencies at good prices. A directory tracking farmer and aggregator interest would facilitate these connections, and the necessary information should not be difficult to collect. This directory could be developed with assistance from farm-to-institution advocates, such as the Massachusetts Farm to School Project, that have existing relationships with the farming community.

The directory could be developed as part of the Massachusetts Department of Agricultural Resources’ online “MassGrown Map.”<sup>166</sup> The MassGrown Map tracks all different types of farms, CSAs, farmers markets, and other agricultural activities, with a search function that allows the user to find farms based on geographic location or by type of agricultural product.<sup>167</sup> The map is currently designed for individual consumers, but some of these farms may also be capable of selling in larger quantities or may be willing to work with an aggregator to distribute their products to state agencies. The Massachusetts Department of Agricultural Resources could add another indicator/icon to the map that identifies which farms are willing and able to sell to Massachusetts agencies.

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<sup>165</sup> Telephone interview with Gary Tomlin, former member of Illinois’ Food, Farm & Jobs Council (Mar. 27, 2013).

<sup>166</sup> See *MassGrown Map*, MASS.GOV, <http://www.mass.gov/agr/massgrown/map.htm> (last visited Dec. 30, 2014).

<sup>167</sup> See *id.*

➤ ***Condition the receipt of state funds for community nutrition programs on attendance at mandatory agency procurement trainings or webinars.***

Many agencies, such as the Department of Youth Services, serve food through community sites where private companies that contract with the state agency have employees purchase food on behalf of the state agency (this is discussed in more detail in Section VI). OSD could adopt a policy requiring that as a condition for receiving state funds, any private entity that purchases food on behalf of these agencies must attend mandatory procurement trainings, either in person or through webinars. These mandatory trainings would ensure that all community sites are aware of Massachusetts agency procurement laws, including Section 23B's local preference requirement, E.O. 509, and E.O. 523, and that the sites receive materials outlining the basics of procuring locally grown food, including a directory of Massachusetts farms and aggregators once such a resource is created.

## **2. Establish a Tracking Mechanism and Reporting Requirement.**

One of the major barriers to increasing local food procurement in Massachusetts is that no mechanism currently exists to track how much local food is being purchased by state agencies. It is extremely difficult to measure progress in procurement without documentation of purchasing data, measurable baselines, and periodic updates.

A few states' local procurement laws include provisions for tracking state purchasing behavior or include a reporting requirement.<sup>168</sup> These states' existing provisions are a good starting point in encouraging agencies to procure more locally grown food products. For example, Illinois agencies are required to track their local food procurement yearly.<sup>169</sup> Illinois also requires its state food policy council, the Local Food, Farms, and Jobs Council, to assist state agencies in developing a system for tracking and reporting annually on local food purchases.<sup>170</sup> Kentucky requires all state agencies purchasing "agricultural products" to report annual purchasing to a legislative commission and the state Department of Agriculture by submitting a state-issued form describing the "types, quantities, and costs" of purchased products.<sup>171</sup>

In December 2013, New York adopted amendments to its local procurement law in an effort to increase documentation of procurement practices and thereby help agencies purchase more locally grown food.<sup>172</sup> Prior to the amendments, there was "little to no reporting, or evidence, that agencies or successful bidders [we]re making an effort to buy locally-grown foods, even when they [we]re available at a competitive price."<sup>173</sup> Pursuant to the amendments, the Commissioner of Purchasing and the

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<sup>168</sup> KY. REV. STAT. ANN. § 45A.645 (West 2012); 30 ILL. COMP. STAT. ANN. 595/10 (West 2012); N.Y. STATE FIN. LAW § 165(4) (McKinney 2013).

<sup>169</sup> 30 ILL. COMP. STAT. ANN. 595/10 (West 2012).

<sup>170</sup> *Id.*

<sup>171</sup> KY. REV. STAT. ANN. § 45A.645(1)(b) (West 2012).

<sup>172</sup> See S.B. 4061, 2013 Leg., 236th Sess. (N.Y. 2013).

<sup>173</sup> S.B. 4061, 2013 Leg., 236th Sess. (N.Y. 2013). The new law requires a high level of communication between New York's Department of Agriculture and Markets (NYSDAM) and state agencies when purchasing food. New York instructs NYSDAM to create a list of locally-grown food products, determining "those periods of time each year that those food products are

Commissioner of Agriculture and Markets must issue regulations that establish guidelines to assist agency purchasing of local food products, provide trainings on the guidelines, and establish a system for monitoring the implementation of the local food procurement law.<sup>174</sup> Each bidder must review a list of New York food products available to be purchased and report all food items procured under the contract.<sup>175</sup> This report must include the type, amount, and dollar value of products procured from New York; products that could be procured from New York, but were not; and products that cannot be procured from New York.<sup>176</sup> Finally, the Commissioner of Purchasing is required to submit an annual report documenting the implementation progress of the local food procurement law.<sup>177</sup>

Although Massachusetts does not currently have a tracking and reporting requirement for its local food purchasing, it does require tracking and reporting for other procurement programs. Agencies in Massachusetts are required to track and report compliance with the SDP and SBPP. Advocates should push Massachusetts to add a similar tracking and reporting requirement to its local food procurement law. State agencies should be required to track local food purchasing and submit annual reports documenting the amount of locally grown food purchased that year. A tracking and reporting requirement would focus attention on increasing locally grown food purchases, while increasing awareness of the need for agencies to alter existing food purchasing practices in order to make progress in this area.

### 3. Establish a Benchmark.

Advocates could also push Massachusetts to incorporate a benchmark requirement into Section 23B. A benchmark law allows a state to mandate a certain amount of the products purchased by state agencies to be grown or produced in-state (for example, a state might decide that 5%, 10%, or 20% of food products purchased by state agencies must be locally produced).<sup>178</sup> For example, Illinois has a benchmark as part of its local procurement law. The law states that it is “the goal of this State that 20% of all food and food products purchased by State agencies and State-owned facilities . . . and public universities, shall, by 2020, be local farm or food products.”<sup>179</sup> Massachusetts’ local procurement law does not contain a benchmark.

A benchmark requirement is a helpful tool to increase local food purchasing because it requires a certain amount of local food to be purchased (or a certain percentage of an agency’s budget to be spent on

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available in sufficient quantities for competitive purchasing.” State agencies must advise NYSDAM whenever they intend to solicit a bid for any foods on the list, and NYSDAM then determines whether those foods can be purchased from New York state businesses in sufficient quantities to meet agency demand. If agency demand can be met, the agency can insert a requirement for locally-grown food into the bid solicitation. All bidders must certify that food products offered through a contract are in conformity with the percentage of locally-grown food specified in the solicitation. If NYSDAM determines that agency demand for certain products cannot be met through the purchase of locally-grown food, then the agency issues a bid without a requirement for locally-grown food. *See* N.Y. STATE FIN. LAW § 165(4)(b)-(f) (McKinney 2013).

<sup>174</sup> N.Y. STATE FIN. LAW § 165(4)(d) (McKinney 2014).

<sup>175</sup> *Id.*

<sup>176</sup> N.Y. STATE FIN. LAW § 165(4)(d) (McKinney 2014).

<sup>177</sup> *Id.* at § 165(4)(g).

<sup>178</sup> *Id.* at § 165(4)(a).

<sup>179</sup> 30 ILL. COMP. STAT. ANN. 595/10 (West 2012).

local food). As in the tracking and reporting recommendation above, Massachusetts already has a precedent of using benchmarks in other procurement programs. The SDP and SBPP both set benchmarks for agency spending in those programs. For FY 2013, agencies set a benchmark to spend 6% of their discretionary budget on minority business enterprises, 12% of their discretionary budget on women business enterprises, and 2.5% of their discretionary budget on SBPP participants.<sup>180</sup> The benchmark requirement is paired with a tracking and reporting requirement, and so agency compliance with these benchmarks is reported in the SDO's annual report.<sup>181</sup>

Advocates such as the Massachusetts Farm to School Project could seek an amendment to Section 23B, setting a time-constrained goal for state agencies to ensure that a certain percentage of their total purchases are of locally grown or locally produced agricultural products. Modeled in part after Illinois' procurement goals statute,<sup>182</sup> the following proposed statutory language serves as a sample of what Massachusetts could do:

*It shall be the goal of the Commonwealth that 20 percent of all agricultural products purchased by the state purchasing agent responsible for procuring the products on behalf of a state agency shall, by 2020, be products grown or produced using products grown in the Commonwealth.*

Alternatively, advocates could push for a benchmark based on a percentage of an agency's budget, similar to what agencies do for the SDP and SBPP. Advocates could suggest agencies spend, for example, 7% of their food budgets on locally grown or produced food. This proposed benchmark should be coupled with the reporting requirement discussed above. This would allow the state to measure progress toward benchmark goals. States can also create interim goals (e.g. by 2017, 10% of all purchased agricultural products will be grown within Massachusetts) to ensure that agencies are on track to reach ultimate targets.

#### **4. Encourage Local Food Producer Enrollment in the Small Business Purchasing Program.**

Advocates could work to increase farmer participation in the SBPP. Under E.O. 523, state agencies must give "special consideration" in their procurement practices to small businesses enrolled in the SBPP.<sup>183</sup> Currently, there do not seem to be any farmers participating in the SBPP.<sup>184</sup> However, nothing in the SBPP would prohibit farmers from joining. In fact, including farmers as small businesses fits in well with the overall mission of the SBPP, which "recognizes the importance of Massachusetts' small businesses and the impact and challenges the latest recession has placed upon them," and strives to, among other

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<sup>180</sup> MASS. OPERAT'L SERVS. DIV., *supra* note 81, at 16.

<sup>181</sup> *Id.*

<sup>182</sup> 30 ILL. COMP. STAT. ANN. 595/10 (West 2012).

<sup>183</sup> Mass. Exec. Order No. 523, *supra* note 23.

<sup>184</sup> Preliminary search of COMMBUY's business directory did not reveal any farms or agricultural businesses designated as SBPP participants. See *Business Directory*, *supra* note 89.

things, “partner with Massachusetts small businesses to strengthen our economy, innovate new job creation, and become a source of community empowerment and economic revitalization.”<sup>185</sup>

To encourage participation by local farmers in the SBPP, advocates could create materials highlighting the reasons why farmers should participate in these programs. Subscription to COMMBUYS is free of charge, and SBPP-participating entities are given priority on the COMMBUYS business directory by being listed above non-SBPP participating entities.<sup>186</sup> Public purchasers use COMMBUYS when looking for vendors with whom to do business, and therefore participation in the SBPP could potentially lead to increased exposure and business for local farmers.<sup>187</sup> Participation in the program would give local farmers a competitive advantage over out-of-state businesses to win awards for small procurements (those under \$150,000), as Massachusetts agencies are required under current SBPP policy to give an absolute preference to SBPP participants who meet contract requirements.<sup>188</sup> Thus, the SBPP seems to offer significant advantages for farmers who participate in it, with few obstacles.

## **5. Encourage Local Food Producer Enrollment in the Supplier Diversity Program.**

Advocates could also work to increase eligible farmer participation in the SDP. Procurement teams are required to dedicate at least 10% of response evaluation points to weighing the relative strength of each bidder’s SDP plan.<sup>189</sup> This is meant to give bidders an incentive to partner with SDP businesses. There is a directory of certified SDP businesses bidders can use to find SDP partners.<sup>190</sup> Currently there are few farmers participating in the SDP.<sup>191</sup> For farms that are minority-owned or women-owned, the SDP could be another way to increase their access to Massachusetts’ institutional food markets.

## **6. Create a Massachusetts-Grown Agricultural Products Purchasing Program.**

As discussed throughout this report, Section 23B’s local preference requirement has not been particularly effective in altering state agency purchasing behavior, in part because it lacks benchmark-setting, tracking, reporting, and other enforcement mechanisms. Yet, the law still stands as an expression of the Massachusetts legislature’s desire to increase procurement of locally grown food. Advocates could use Section 23B to garner support for a new policy or executive order that could establish a Massachusetts-grown Agricultural Products Purchasing Program (MAPPP).

With a design similar to E.O. 523’s SBPP, MAPPP could direct all state agencies to give “special consideration” in their food procurement practices to Massachusetts farms or farm aggregators who enroll in the program. OSD could be tasked with managing, monitoring, and enforcing the requirements

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<sup>185</sup> Mass. Exec. Order No. 523, *supra* note 23.

<sup>186</sup> MASS. OPERAT’L SERVS. DIV., SMALL BUSINESS PURCHASING PROGRAM FACT SHEET (undated), *available at* <http://www.mass.gov/anf/docs/osd/sbpp/sbppinfosheet14.pdf> (last visited Dec. 30, 2014).

<sup>187</sup> *Id.*

<sup>188</sup> MASS. OPERAT’L SERVS. DIV. PROCUREMENT INFO. CTR., PROCUREMENT OVERVIEW 21 (2013), *available at* <http://www.mass.gov/anf/budget-taxes-and-procurement/oversight-agencies/osd/procurement-information-center.html> (last visited Dec. 30, 2014).

<sup>189</sup> *Supplier Diversity Program*, *supra* note 92, at 1.

<sup>190</sup> *Directory of Certified Businesses Search*, *supra* note 97.

<sup>191</sup> *Id.*

of the program; OSD could also provide technical assistance, outreach, and procurement training to local farmers and aggregators. Massachusetts farmers and aggregators could determine eligibility and enroll in the MAPPP through COMMBUYS, and OSD could have the authority to audit these enrollments and assess penalties for fraudulent claims.

To measure the success of the program, OSD could be required to track each state agency's spending on food supplied by MAPPP participants and establish annual benchmarks for the amount of future MAPPP purchases, much like the SBPP. To assist OSD in tracking MAPPP-related expenditures, agencies would designate "Massachusetts-grown" purchases in the Massachusetts online accounting system. At the end of the year, OSD could prepare an annual report discussing the program's effectiveness.

In connection with the new policy, OSD could consider adopting a policy requiring that state agencies award small procurements—those valued between \$10,000 and \$150,000—to eligible MAPPP participants, as it does for purchases under the SBPP.<sup>192</sup>

Another benefit of establishing a MAPPP is that the program provides a solution to the tracking issues currently faced by OSD and other agencies. Most agencies purchase food through vendors, and cannot readily determine whether the foods purchased through these vendors originated on a farm in Massachusetts or from a farm outside of the state. Under MAPPP, agencies would already know whether a vendor sources a significant amount of food from local farms based on whether or not the vendor has enrolled in the MAPPP. Enrollment in MAPPP would be voluntary, but the program would incentivize Massachusetts farms to enroll because it would grant Massachusetts farms preferential treatment in state procurements.

This comprehensive policy will likely have a significant impact on state agency purchasing as it would be nearly identical to E.O. 523's SBPP, which within two years saw a doubling of state procurement through the SBPP, reaching \$121.8 million.<sup>193</sup> Until a MAPPP policy is established as discussed above, advocates can encourage farmers to enroll in the SBPP to help increase the farmers' access to state procurement contracts.

## **7. Encourage OSD to Divide the Prime Grocer Contract into Multiple Contracts.**

The prime grocer contract requires bidders to supply a wide range of food that includes food that can be grown locally and food that cannot be grown locally. This restricts Massachusetts farmers' ability to bid on the prime grocer contract (as a vendor or subvendor). OSD could be encouraged to split the prime grocer contract into smaller contracts to address this issue. There could be one contract that contains only food that cannot be grown locally (for example, bananas, avocados, mangoes, pineapple, etc). The other contract would contain food that could be grown locally. With these separate contracts, local

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<sup>192</sup> *OSD Policy Guidance 14-01*, *supra* note 62, at 2.

<sup>193</sup> The Small Business Purchasing Program was established in 2010. In FY2011, OSD reported that expenditures through the program totaled \$59.7 million; by FY2012, that figure had grown \$121.8 million. See MASS. OPERAT'L SERVS. DIV., *supra* note 64, at 43.

farmers could bid to be a vendor on the prime grocer contract supplying locally available goods. In the meantime, farmers could work with the other major vendors to be a subvendor on the prime grocer contract (like the companies listed in Appendix F: July 2014 Food Order Guides).

## **8. Split Agency-Specific Food Contracts into Multiple Contracts.**

As mentioned earlier and discussed in more detail below, some Massachusetts agencies create separate agency-specific contracts to procure food for their clients' needs. However, similar to the prime grocer contract, these contracts require bidders to supply both locally grown and non-locally grown food items. To illustrate, the majority of food items specified in the DOC's fresh produce contract are items that could be supplied locally. However, the presence of other items such as bananas and oranges precludes the participation of local farmers or aggregators in the bidding process, as they cannot supply all foods requested under the contract.<sup>194</sup> DOC and other agencies that currently list all produce together under one contract could instead split the contract into two separate contracts: one contract for food items that can be grown locally, and the other contract for food items that cannot be grown locally. Farmers and aggregators of Massachusetts-grown products would then be eligible to bid on the contract for locally grown food items.

## **9. Add a Preference for Regional Food Products to Section 23B.**

It is possible that one reason agencies do not purchase local food is because they assume there is not a sufficient supply of local food to meet the agency's food needs. One way to address this supply issue is to extend a preference to a broader geographic range. Because Massachusetts is located so close to other New England states with farms that could supply Massachusetts agencies, establishing a preference for food from New England might encourage agencies to purchase food from across New England.

Although Massachusetts' local food procurement law is intended to support agricultural producers within the state, a regional approach to food procurement in New England makes sense for a number of reasons. First, because New England is such a small area, much of the food that comes from the other New England states can still be considered "local." Second, the economies of the New England states are connected and strengthening the agricultural economy throughout New England will benefit the region as a whole. Third, expanding the range for local food products to include the other New England states will increase the supply of locally grown and produced food. Not only are there more farms from which to purchase food directly, but aggregators would have a wider supply from which to draw, which could make them more competitive in the bidding process. Finally, by providing a preference for regional food, other New England states may be incentivized to give a preference for Massachusetts products for farms that are near the borders.

There is one example of a procurement law that incorporates a regional food preference. Ohio is the only state that provides a preference for both products produced or mined in Ohio as well as in a border

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<sup>194</sup> See Request for Response 10-9043-PRODUCE, Don Staffiere, Deputy Dir., Dep't of Corr. (Sept. 25, 2009).

state.<sup>195</sup> Ohio- and border state- products receive a 5% price preference.<sup>196</sup> Following Ohio's lead, advocates in Massachusetts can push for adding a regional preference to Section 23B. Food products from Massachusetts could still receive the highest preference (at 10%), while food products procured from other New England states could receive, say a 5% or 7% price preference.

## VI. SPECIFIC AGENCY PURCHASING INFORMATION AND RECOMMENDATIONS

The previous section identified and discussed challenges to and recommendations for increasing local food procurement across all Massachusetts state agencies. Recall that agencies are required to purchase food through existing statewide contracts (e.g., the prime grocer contract), unless granted an exemption from OSD.<sup>197</sup> Each agency has individualized food needs and its own system for purchasing, preparing, and serving food, and therefore, many state agencies have their own smaller food contracts that they manage. To better assess the challenges and potential solutions for promoting procurement of Massachusetts-grown food, it is essential to understand how the nine agencies that serve food to dependent clients operate, to whom they serve food, the volume and frequency of food purchasing, and whether purchasing is centralized or conducted through individual branches.<sup>198</sup>

The nine agencies that serve food to dependent clients are:<sup>199</sup> Department of Children and Families; Department of Correction; Department of Developmental Services; Executive Office of Elder Affairs; Department of Mental Health; Department of Public Health; the sheriffs' offices; Department of Veterans' Services;<sup>200</sup> and Department of Youth Services. Collectively, these nine agencies serve forty-two million meals annually and represent the largest agency food purchasers.<sup>201</sup> Although the Department of Elementary and Secondary Education (DESE) is a significant purchaser of food, different rules pertain to school food purchasing, and purchases are made by individual school districts, rather than DESE.<sup>202</sup> Because of these significant differences in purchasing requirements and practices, procurement of locally grown food by schools is outside the scope of this report.

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<sup>195</sup> OHIO ADMIN. CODE 123:5-1-06 (2012).

<sup>196</sup> *Id.*

<sup>197</sup> MASS. OPERAT'L SERVS. DIV., *supra* note 17, at 19.

<sup>198</sup> Massachusetts' executive branch departments include eighty-two agencies (for a full list, see Appendix D: Massachusetts Executive Agencies), each subject to the local agricultural products preference law in Section 23B. *Id.* at 3.

<sup>199</sup> BAYERL, *supra* note 11, at 2.

<sup>200</sup> This includes the Soldiers' Homes in Chelsea and Holyoke.

<sup>201</sup> BAYERL, *supra* note 11, at 2.

<sup>202</sup> For a discussion on state college and university procurement of local agricultural products, see ABRAMS, ET AL., *supra* note 10.

**Figure 6. Massachusetts State Agency Food Purchasing Overview<sup>203</sup>**

Agency	No. of Sites	No. of Clients Served per Day	No. of Meals Served per Day	Dollars Spent on Prime Grocer (GRO-14), FY 2012 <sup>204</sup>
Department of Correction	18 <sup>205</sup>	11,000 <sup>a</sup>	33,000	\$9,563,000
Department of Developmental Services	2 residential facilities; <sup>206</sup> 200 group homes; 2,700-3,000 community sites	9,000-10,000	30,000 <sup>a</sup>	\$250,000
Executive Office of Elder Affairs	27 programs serving food through 400 community sites and home deliveries <sup>207</sup>	unknown	23,000 <sup>208</sup>	\$0
Department of Mental Health	6 hospitals/ 29 local sites <sup>209</sup>	3,887	11,661 <sup>a</sup>	\$1,136,000
Department of Youth Services	56 residential facilities; 26 community programs	2,000-6,700	2,000+ <sup>b</sup>	\$1,840,000
Sheriffs' Offices	14	14,000 <sup>a</sup>	42,000 <sup>210</sup>	\$2,649,000
Department of Public Health	4	800	2,400 <sup>a</sup>	\$262
Department of Veterans' Services	6 shelters; 1 hospital	467 <sup>a</sup>	1,400	\$1,757,000
Department of Children and Families	1	46	16,376	\$13,000

<sup>a</sup> Assuming three meals per day

<sup>b</sup> Frequency of meals unknown

<sup>203</sup> Unless otherwise noted, data was obtained through the Massachusetts Department of Public Health E.O. 509 Agency Survey. See BAYERL, *supra* note 11, at 2.

<sup>204</sup> See OPERAT'L SERVS. DIV., *supra* note 118.

<sup>205</sup> MASS. DEP'T OF CORRECTION, STRATEGIC PLAN: 2012-2017 7 (2012), available at <http://www.mass.gov/eopss/docs/doc/research-reports/strategicplan-03-12-12.pdf> (last visited Jan. 5, 2015).

<sup>206</sup> DDS was in the process of restructuring its facilities to close four of its six larger residential facilities, so that patients can receive the least restrictive care and the state can realize cost savings. Facilities at Fernald, Monson, Templeton, and Glavin were to be closed by 2013, with individuals being transferred to community homes or the two remaining large facilities, Hogan or Wrentham. See MASS. DEP'T OF DEVELT SERVS., DMR COMMUNITY SERVICES EXPANSION AND FACILITIES RESTRUCTURING PLAN 1 (2009), available at <http://www.mass.gov/eohhs/docs/dmr/facilities-restructuring-plan.pdf> (last visited Jan. 5, 2015). However, the DDS website still includes Fernald and Templeton under its list of facilities. *DDS Regional, Area Offices, and Facilities*, MASS. DEP'T OF DEVELT SERVS., <http://www.mass.gov/eohhs/consumer/disability-services/services-by-type/intellectual-disability/support/dds-regional-area-offices-and-facilities.html> (last visited Jan. 5, 2015).

<sup>207</sup> *Id.*

<sup>208</sup> Rough estimation, based on the 8.5 million meals served each year. See *Elderly Nutrition Program Overview*, MASS. EXEC. OFFICE OF ELDER AFFAIRS, <http://www.mass.gov/elders/meals-nutrition/elderly-nutrition-program-overview.html> (last visited Jan. 5, 2015).

<sup>209</sup> See MASS. DEP'T OF MENTAL HEALTH, SFY2012-2014 STATE MENTAL HEALTH PLAN 26-27 (2011), available at <http://www.mass.gov/eohhs/docs/dmh/state-mental-health-plan-2012.pdf> (last visited Jan. 5, 2015).

<sup>210</sup> Data from Bayerl presentation indicates that the sheriffs' offices serve 42,000 clients per year; however it is more likely that there were 42,000 *meals* served, and therefore this figure has been included in the annual meals column. BAYERL, *supra* note 11, at 2. According to the most recent Bureau of Justice Statistics' Census of Jail Facilities, Massachusetts had only 13,214 inmates in local jails in 2006, and therefore presumably served approximately 40,000 meals that year. See James Stephan & Georgette Walsh, *Census of Jail Facilities, 2006*, BUREAU OF JUSTICE STATISTICS 17 (2011), available at <http://bjs.gov/content/pub/pdf/cjf06.pdf> (last visited Jan. 5, 2015).

This section provides an overview of these nine agencies, along with a discussion of potential opportunities to increase local food procurement, highlighting the barriers and drawbacks specific to each agency. Some of these recommendations are short-term strategies meant to serve as stop-gaps until stronger laws are in place, while others are steps in creating better procurement practices that enhance the agency's ability to purchase locally grown food. In this section, the recommendations for each agency directly follow the background and discussion of each agency.

## **A. Department of Correction**

The Department of Correction (DOC) is responsible for the care and custody of inmates sentenced to state prison, and of persons under mental health commitments, civil commitments due to alcohol and substance abuse, sexually dangerous person commitments, and certain pre-trial detainees, sentenced county inmates, and federal inmates.<sup>211</sup> DOC operates eighteen correctional facilities, located in eight different communities in eastern and central Massachusetts, including two maximum-security prisons, nine medium-security prisons, six minimum-security prisons, and five pre-release centers.<sup>212</sup> There are three fiscal units within DOC (located in Milford, Concord, and Bridgewater); each of which is responsible for the budgets and purchasing for one or more DOC facilities.<sup>213</sup>

In total, DOC serves approximately 33,000 meals each day, at a per-inmate cost of \$3.07 per day (this is the total for three meals a day).<sup>214</sup> Food must be served according to the American Academy of Nutrition and Dietetics nutritional guidelines, including a variety of alternative menus suited for religious and therapeutic diet needs.<sup>215</sup> DOC's consultant dietitian develops the meals.<sup>216</sup> Cost constraints, coupled with a minimum calorie requirement, limits flexibility in the content of food purchases.<sup>217</sup> DOC's food expenses—which totaled \$14.6 million in 2011<sup>218</sup>—are generally divided between the statewide prime grocer contract (65%), milk and dairy contract (15%), and baked goods contract (5%), as well as its own fresh produce contract (15%).<sup>219</sup> In 2012, DOC's expense on the prime grocer contract alone amounted to over \$9.5 million. These numbers qualify DOC as the largest purchaser on the prime grocer contract.<sup>220</sup>

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<sup>211</sup> MASS. DEP'T OF CORRECTION, *supra* note 205, at 11–12.

<sup>212</sup> Some pre-release centers share facilities with prisons. *Id.* at 7, 9.

<sup>213</sup> See MASS. DEP'T OF CORRECTION, REQUEST FOR RESPONSE # 10-9043-PRODUCE 11 (2009), *available at* <https://www.commbuys.com> (click on the "Contract & Bid Search" link, select "Contracts/Blankets," input "C118818-vCurrent" into Contract/Blanket # box and click "Find It," click the "C118818-vCurrent" link, in the list of agency attachments click "RFRPRODUCE") (last visited Jan. 5, 2015).

<sup>214</sup> Telephone Interview with Chris Gendreau, Director of Food Service, Milford, MA, Mass. Dep't of Correction (Nov. 13, 2012).

<sup>215</sup> *Id.* See also 103 MASS. CODE REGS. 761.06 (2013).

<sup>216</sup> Gendreau, *supra* note 214. See also 103 MASS. CODE REGS. 761.06 (2013).

<sup>217</sup> Gendreau, *supra* note 214.

<sup>218</sup> MASS. DEP'T OF CORRECTION, 2011 ANNUAL REPORT 46 (2012), *available at* <http://www.mass.gov/eopss/docs/doc/annual-report-2011-final-08-01-12.pdf> (last visited Jan. 5, 2015).

<sup>219</sup> Gendreau, *supra* note 214.

<sup>220</sup> See MASS. OPERAT'L SERVS. DIV., *supra* note 118.

Under its fresh produce contract, which accounts for approximately 15% of food expenditures (roughly \$900,000 in FY 2012),<sup>221</sup> DOC has authorized four vendors<sup>222</sup> to supply fruits and vegetables to its various facilities.<sup>223</sup> In addition to complying with delivery security requirements, vendors must carry liability insurance of up to \$300,000.<sup>224</sup> DOC designed the RFR for the DOC-specific fresh produce contract as a “rolling enrollment” solicitation, meaning that additional qualifying vendors can bid and be added at any point during the fresh produce contract.<sup>225</sup> In terms of compliance with Section 23B, there is evidence that at least three of the four vendors currently under contract—Greg’s Packing/Vega Distributors, J.W. Lopes, and Maine’s Paper & Food Services—make an effort to source locally-grown produce when possible, although precise figures regarding local purchasing are unknown.<sup>226</sup>

In addition, DOC contracted with a food service management company, Trinity Services, to provide food to inmates at four locations—MCI Framingham, South Middlesex Correctional Center, Pondville Correctional Center, and Boston Pre-Release Center—beginning in 2013.<sup>227</sup> Under the terms of the RFR, the food service management company will provide all food and beverages to these four locations—in effect, outsourcing food procurement to a third party.<sup>228</sup> The RFR states that the food service management company may order food through the prime grocer contract if desired.<sup>229</sup> DOC retains the right to review and compare prices of food ordered by the food service management company to prices of those foods available through the prime grocer contract, and adjust reimbursed food costs to reflect savings available under the prime grocer contract.<sup>230</sup>

<sup>221</sup> Email from Don Staffiere, Acting Fiscal Director, Mass. Dep’t of Correction (April 18, 2013) (on file with author).

<sup>222</sup> MASS. DEP’T OF CORRECTION, C118818-vCURRENT\_OD.XLSX, *available at* <https://www.commbuys.com> (click on the “Contract & Bid Search” link, select “Contracts/Blankets,” input “C118818-vCurrent” into Contract/Blanket # box and click “Find It,” click the “C118818-vCurrent” link, in the list of agency attachments click “C118818-vCurrent\_OD.xlsx” and view “BlanketDistributosAllOther” tab) (last visited Jan. 5, 2015).

<sup>223</sup> The DOC’s contract calls for many of the same vegetables, although at much larger quantities: apples, bananas, cabbage, carrots, celery, lettuce, onions, peppers, potatoes, tomatoes, salad mix and oranges. *See* MASS. DEP’T OF CORRECTION, *supra* note 213, at 30–31.

<sup>224</sup> *See id.* at 13. All delivery personnel must clear background checks, and all vehicles and equipment must be checked, searched and approved each time the vendor enters or leaves a DOC facility. Jeans cannot be worn inside the facility, and tobacco cannot be brought in either. In addition, vendors must keep all DOC records secure and confidential.

<sup>225</sup> *See id.* at 3.

<sup>226</sup> J.W. Lopes makes an effort to support local farmers “in growing season.” *See Products*, J.W. LOPES, <http://jwlopes.com/products.html> (last visited Jan. 5, 2015). Maine’s Paper & Food Services, Inc. sources in-season produce from within a 100-mile radius of its headquarters in upstate New York. The company also electronically tracks its produce. *Local Produce*, MAINE’S PRODUCE EXPRESS, <http://www.maines.net/produce-express/products/local-produce> (last visited Jan. 5, 2015).

<sup>227</sup> *See* MASS. DEP’T OF CORRECTION, C146890-vCURRENT\_OD.XLSX, *available at* <https://www.commbuys.com> (click on the “Contract & Bid Search” link, select “Contracts/Blankets,” input “C146890-vCurrent” into Contract/Blanket # box and click “Find It,” click the “C146890-vCurrent” link, in the list of agency attachments click “C146890-vCurrent\_OD.xlsx” and view “BlanketDistributosAllOther” tab) (last visited Jan. 5, 2015); MASS. DEP’T OF CORRECTION, REQUEST FOR RESPONSE, FOOD SERVICES, RFR #13-DOC-FOOD-J56, 7–8, *available at* [www.commbuys.com](http://www.commbuys.com) (click on the “Contract & Bid Search” link, select “Bids,” input “S134379-vCurrent” into Bid # box and click “Find It,” click the “S134379-vCurrent” link, in the list of agency attachments click “13-DOC-Food-J56”) (last visited Jan. 5, 2015).

<sup>228</sup> MASS. DEP’T OF CORRECTION, REQUEST FOR RESPONSE, *supra* note 227.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

## ***Recommendations for the Department of Correction***

DOC is a high-volume food purchaser, and spends almost \$15 million annually to serve approximately twelve million meals.<sup>231</sup> Its eighteen facilities are located within only eight communities, which provides a relatively centralized delivery route for food products (compared to other agencies that have hundreds or thousands of community sites where food is served).

There is evidence that DOC may already purchase some locally grown produce through its fresh produce contract. One short-term strategy to increase local food purchases is for advocates to reach out to the four vendors authorized under DOC's own fresh produce contract (not the same vendors as the statewide prime grocer contract), connecting them to additional farms in Massachusetts. The success of this strategy is, of course, contingent on the vendors' willingness to contract with local farms, but two of the three vendors have stated that they prioritize local food purchases when feasible.

Another potential strategy is to encourage a local farm or an aggregator of local produce to bid on the fresh produce contract. As mentioned above, DOC solicits bids for fresh produce on a "rolling enrollment" basis,<sup>232</sup> and therefore a local farmer or vendor could bid on the contract immediately. Individual small-scale farmers, however, may find it difficult or impossible to supply the large amount of produce required on a monthly basis, or to satisfy the contract's \$300,000 minimum liability insurance requirement.<sup>233</sup>

In addition, certain specified food items in the contracts are not grown in Massachusetts, such as bananas and oranges,<sup>234</sup> this is another issue preventing local farmers from bidding on the contract. One solution to overcome these barriers is to request that DOC provide a split contract and purchase seasonal produce from Massachusetts farmers or aggregators when seasonally appropriate. DOC could also work with the food service management company serving these four locations to source more local produce.

## ***B. Department of Developmental Services***

The Department of Developmental Services (DDS), formerly known as the Department of Mental Retardation,<sup>235</sup> provides specialized services and support to 32,000 individuals and children with intellectual and developmental disabilities.<sup>236</sup> Programs and services are administered through 2,700-3,000 community sites, 200 group homes and seven larger residential facilities, and include day

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<sup>231</sup> MASS. DEP'T OF CORRECTION, *supra* note 218; BAYERL, *supra* note 11, at 2.

<sup>232</sup> See MASS. DEP'T OF CORRECTION, *supra* note 213, at 3.

<sup>233</sup> See *id.* at 9, 13.

<sup>234</sup> See *id.* at 30–31.

<sup>235</sup> See Mass. Exec. Order No. 521 (Mar. 31, 2010), *available at* <http://www.mass.gov/governor/legislationeexecorder/executiveorder/executive-order-no-521.html> (last visited Jan. 5, 2015).

<sup>236</sup> *About the Department*, DEP'T OF DEVT'L SERVS., <http://www.mass.gov/eohhs/consumer/disability-services/services-by-type/intellectual-disability/newsroom/about/> (last visited Jan. 5, 2015).

supports, employment supports, residential supports, family supports, respite, and transportation.<sup>237</sup> Its two larger facilities, Wrentham Developmental Center and Hogan Regional Center, accommodate approximately 350 and 150 individuals, respectively.<sup>238</sup>

DDS serves meals to approximately 9,000-10,000 clients each day.<sup>239</sup> In 2012, DDS purchased \$250,000 worth of goods through the prime grocer contract (representing 1.4% of total spent on the contract).<sup>240</sup> Based on an understanding of the agency and on its low spending through the prime grocer contract, it is likely that DDS contracts with food service management companies to purchase and prepare food for the facilities at Wrentham and Hogan. Further research is needed to determine if this is the case, as no contracts for these services are currently posted on the COMMBUYS website.

Instead of establishing a department-wide contract for the food needs of its numerous group homes, DDS authorizes staff to purchase groceries from grocery stores and other retail establishments within their communities.<sup>241</sup> DDS prequalifies retail vendors so that DDS-designated “shoppers” may purchase food in those stores.<sup>242</sup> Participants must agree to bill DDS directly for purchases, rather than charge the shopper, and must provide the lowest or best current pricing for items, without adding a service charge.<sup>243</sup> This procurement method allows individuals residing in these homes to participate in food selection, which is an important component of DDS’ mission to promote self-determination and create opportunities for intellectually disabled individuals to interact with their community in meaningful ways.<sup>244</sup>

### ***Recommendations for the Department of Developmental Services***

DDS has become increasingly decentralized. Its 2009 restructuring plan called for the closure of four of its six large residential facilities and the transfer of most residents to smaller group homes or community sites by 2013.<sup>245</sup> Despite the shift away from larger facilities, Wrentham and Hogan will remain in operation. These two particular facilities present opportunities for large-quantity purchases of Massachusetts-grown food. Local food advocates could work with DDS to create a fresh produce contract, similar to the contract utilized by DOC and the Department of Children and Families. A

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<sup>237</sup> MASS. DEP’T OF DEVTL SERVS., REQUEST FOR RESPONSE: HOUSEHOLD SUPPLIES STATE OPERATED HOMES AND FACILITIES 2 (2009), *available at* <https://www.commbuys.com> (click on the “Contract & Bid Search” link, select “Bids,” input “S108601-vCurrent” into Bid # box and click “Find It,” click the “S108601-vCurrent” link, in the list of file attachments click “2022”) (last visited Jan. 5, 2015); *DDS-Area Office Locator* MASS. DEP’T OF DEVTL SERVS., <http://www.dmr.state.ma.us/frmMain.asp> (last visited Jan. 5, 2015); BAYERL, *supra* note 11, at 2. DDS was in the process of restructuring its facilities to close four of its six larger residential facilities, so that patients can receive the least restrictive care and the state can realize cost savings. Facilities at Fernald, Monson, Templeton, and Glavin were to be closed by 2013, with individuals being transferred to community homes or the two remaining large facilities, Hogan or Wrentham. *See* MASS. DEP’T OF DEVTL SERVS., *supra* note 206, at 1. However, the DDS website still includes Fernald and Templeton under its list of facilities. *DDS Regional, Area Offices, and Facilities*, *supra* note 206.

<sup>238</sup> *See* MASS. DEP’T OF DEVTL SERVS., *supra* note 206, at 4.

<sup>239</sup> *See* BAYERL, *supra* note 11, at 2.

<sup>240</sup> *See* OPERAT’L SERVS. DIV., *supra* note 118.

<sup>241</sup> MASS. DEP’T OF DEVTL SERVS., *supra* note 237, at 3.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 12.

<sup>244</sup> *Id.* at 1.

<sup>245</sup> *See* MASS. DEP’T OF DEVTL SERVS., *supra* note 206, at 16.

dedicated DDS produce contract to serve Wrentham and Hogan facilities would facilitate local procurement of fresh produce, as nearby farms or aggregators would not have to provide extremely large quantities of produce or additional packaged goods as requested under the existing statewide prime grocer contract. As the two facilities are located in different areas of the state, the contract solicitation could be drafted to authorize multiple vendors, and to allow vendors to provide goods to only one location, which would minimize delivery distance and maximize opportunity for participation by small farmers.

Further research is needed to determine whether Wrentham and Hogan contract with food service management companies to provide food to clients. If these two facilities do contract with food service management companies, then it is important to determine whether DDS retains discretion over food purchasing decisions. If these food service management companies purchase food independently of DDS, local food advocates could reach out to the companies and encourage them to create smaller contracts with local farms in their capacity as independent decision makers. DDS could also insert language into future contracts with food service management companies stating that DDS retains control over certain food purchasing decisions, such as whether food will be purchased from Massachusetts farms.

With regard to the 200 group homes that purchase food from grocery stores within their communities, advocates could increase local food purchases by conducting outreach and educational sessions to connect the homes to local farmers markets, farm stands, and community-supported agriculture operations (CSAs). Community vendors must be preapproved by DDS and must agree to bill DDS directly for these purchases,<sup>246</sup> which is a potential barrier because some farmers may not want to wait to receive payment from DDS.

### ***C. Executive Office of Elder Affairs***

The Executive Office of Elder Affairs (Elder Affairs) provides programs and services to protect the health, wellbeing, independence, and dignity of elderly persons.<sup>247</sup> Elder Affairs administers the Nutrition Program for the Elderly, which consists of twenty-seven regional nutrition program offices throughout Massachusetts that serve more than 8.5 million meals each year to qualifying persons sixty years of age or older.<sup>248</sup> Approximately 70% of these meals are delivered to seniors at home, with the remaining 30% of meals provided at 400 congregate meal sites.<sup>249</sup> Each meal contains at least 1/3 of the current daily recommended dietary allowance of nutrients for elderly persons.<sup>250</sup> Apart from meals, the program also

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<sup>246</sup> See MASS. DEP'T OF DEVELT SERVS., *supra* note 237, at 2-3.

<sup>247</sup> MASS. EXEC. OFFICE OF ELDER AFFAIRS, STATE PLAN ON AGING: FEDERAL FISCAL YEARS 2010-2013 1 (2010), *available at* <http://www.mass.gov/elders/docs/state-plan-on-aging.pdf> (last visited Jan. 5, 2015).

<sup>248</sup> *Elderly Nutrition Program Overview*, *supra* note 208.

<sup>249</sup> MASS. EXEC. OFFICE OF ELDER AFFAIRS, RFR – ELD – 2007-4 AMENDED: USDA COMMODITY PROCESSING BEEF, PORK AND FRUIT 9 (2012), *available at* <https://www.commbuys.com> (click on the “Contract & Bid Search” link, select “Bids,” input “S110676-vCurrent” into Bid # box and click “Find It,” click the “S110676-vCurrent” link, in the list of file attachments click “BEEF\_PORK\_AND\_FRUIT\_RFR\_amended”) (last visited Jan. 5, 2015).

<sup>250</sup> *Elderly Nutrition Program Overview*, *supra* note 208.

provides nutrition screening, assessment, education, and counseling to help elders maintain healthy, nutritious diets.<sup>251</sup>

Nearly all of the twenty-seven nutrition programs contract with food service management companies to prepare meals for group sites and home delivery.<sup>252</sup> The remaining nutrition programs prepare meals themselves at kitchens they lease or own, or at shared kitchens owned by another governmental entity, such as a local school district.<sup>253</sup> In total, Elder Affairs prepares meals at eighty-three sites.<sup>254</sup> Meals are funded through a combination of federal and state monies as well as donations from participating seniors.<sup>255</sup> Elder Affairs purchases approximately \$2 million worth of commodity foods from the USDA, such as meat, poultry, fish, fruits and vegetables, grain, oil, peanuts, and dairy products.<sup>256</sup>

### ***Recommendations for the Executive Office of Elder Affairs***

Elder Affairs serves a large number of meals per day (23,000), prepared across eighty-three decentralized sites. A centralized department within Elder Affairs pre-selects food vendors by conducting a competitive bidding process, and then the twenty-seven individual nutrition programs order food products based on available inventory from these vendors.<sup>257</sup> Elder Affairs can work with the food service management company to increase local food purchasing, and in a future RFR could give more weight to bids that source local food.

## ***D. Department of Mental Health***

The Department of Mental Health (DMH) provides programs and services to promote mental health and prevent and treat mental illness.<sup>258</sup> It operates two state psychiatric hospitals, four community mental health centers with inpatient units, two adult extended stay units at public health hospitals,<sup>259</sup> community-based services at 522 community sites, and contracts with outside adult and adolescent extended stay inpatient units.<sup>260</sup> DMH serves food to nearly 3,900 patients a day,<sup>261</sup> and spent \$1.1 million on the prime grocer contract in 2012.<sup>262</sup> Further research is needed to determine whether DMH contracts with food service management companies to purchase and prepare food at its larger facilities.

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<sup>251</sup> *Id.*

<sup>252</sup> Telephone Interview with Shirley Chao, Director of Nutrition, Mass. Exec. Office of Elder Affairs (April 24, 2013); *see also* MASS. EXEC. OFFICE OF ELDER AFFAIRS, *supra* note 249, at 9.

<sup>253</sup> MASS. EXEC. OFFICE OF ELDER AFFAIRS, RFR – ELD – 2012-02: USDA COMMODITY COMMERCIAL DISTRIBUTOR 2 (2012).

<sup>254</sup> *Id.* at 3.

<sup>255</sup> *Id.* at 2.

<sup>256</sup> *Id.*

<sup>257</sup> Email from Shirley Chao, Director of Nutrition, Mass. Exec. Office of Elder Affairs (May 3, 2013) (on file with author).

<sup>258</sup> *Department of Mental Health*, MASS.GOV, <http://www.mass.gov/eohhs/gov/departments/dmh> (last visited Jan. 5, 2015).

<sup>259</sup> Lemuel Shattuck Hospital in Boston and Tewksbury Hospital. *See DMH Continuing Care Inpatient Facilities*, MASS.GOV, <http://www.mass.gov/eohhs/gov/departments/dmh/dmh-continuing-care-inpatient-facilities.html> (last visited Jan. 5, 2015).

<sup>260</sup> *See* MASS. DEP'T OF MENTAL HEALTH, *supra* note 209, at 27; BAYERL, *supra* note 11, at 2.

<sup>261</sup> *See* BAYERL, *supra* note 11, at 2.

<sup>262</sup> *See* MASS. OPERAT'L SERVS. DIV., *supra* note 118.

### ***Recommendations for the Department of Mental Health***

DMH resembles DDS in that it operates larger facilities and oversees hundreds of community sites throughout the state. One way DMH can increase local food procurement at its eight larger hospitals and community mental health centers is by creating a fresh produce contract, or multiple smaller produce contracts, similar to those utilized by DOC and the Department of Children and Families. As DMH operates units at two Department of Public Health hospitals, there may be an opportunity for the two agencies to pool produce orders at those locations. If DMH contracts with an outside company to manage its food services, however, then it may be more limited in its ability to direct purchasing toward local foods.

### ***E. Department of Public Health: Public Health Hospitals***

The Department of Public Health (DPH) operates four hospitals, known as public health hospitals, which provide acute and chronic medical care to low-income individuals and others who lack access to healthcare: Lemuel Shattuck Hospital (Boston), Massachusetts Hospital School (Canton), Tewksbury Hospital (Tewksbury), and Western Massachusetts Hospital (Westfield).<sup>263</sup>

The Public Health Hospitals' core focus is delivering health care services to special populations as well as providing education and conducting research activities.<sup>264</sup> Collectively, the four hospitals serve food to approximately 800 patients each day.<sup>265</sup> DPH contracts directly with food service management companies at its inpatient facilities,<sup>266</sup> although exact information regarding the service arrangement is unknown.

### ***Recommendations for the Department of Public Health***

DPH serves food at only four locations, which makes this agency a good target for local farmers who face difficulties delivering to numerous sites. Its total patient population is not relatively large, with only 800 individuals receiving food each day. Although DPH currently contracts with outside companies to manage its food services, potentially reducing its ability to steer purchasing toward local foods, advocates can reach out to these companies to encourage them to contract with Massachusetts farms. DPH could also insert language into future contracts with food service management companies stating that DPH retains control over certain food purchasing decisions, such as whether food will be purchased from Massachusetts farms. If DPH regains control over food purchasing decisions, advocates could encourage DPH to create a fresh produce contract and explore the possibility of pooling produce orders with DMH at Lemuel Shattuck Hospital and Tewksbury Hospital, where DMH operates extended stay units.

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<sup>263</sup> See *Public Health Facilities*, MASS.GOV, <http://www.mass.gov/eohhs/gov/departments/dph/programs/hospitals> (last visited Jan. 5, 2015).

<sup>264</sup> See *id.*

<sup>265</sup> See BAYERL, *supra* note 11, at 2.

<sup>266</sup> Email from Cynthia Bayerl, Nutrition Coordinator, Mass. Dep't of Public Health (May 8, 2013) (on file with the author).

## F. Sheriffs' Offices

Massachusetts funds fourteen county sheriffs' offices,<sup>267</sup> which are responsible for, among other things, the management of jails and houses of correction within their counties. While the local sheriffs have operational and administrative control over occupied buildings, DOC establishes minimum standards of care for all persons under the custody of county facilities and conducts inspections twice a year to verify compliance with these standards.<sup>268</sup> Inmate population size varies among counties. Some counties have a much lower capacity, such as Dukes County, which can only hold up to twenty-one inmates.<sup>269</sup> Other counties can hold many more inmates, such as Suffolk County, which has beds for over 2,700 individuals, and Bristol County, which has beds for 1,400 individuals.<sup>270</sup> Collectively, the sheriffs' offices serve 42,000 meals each day,<sup>271</sup> and spent \$2.6 million on the prime grocer contract in 2012.<sup>272</sup> At least one county contracts directly with a food service management company.<sup>273</sup>

### Recommendations for the Sheriffs' Offices

Although the sheriffs' offices serve food to a large number of inmates each day, system-wide changes in procurement would be difficult, as the sheriffs' offices operate across fourteen different counties. The best way to increase procurement of local foods would be to focus strategically on one or two counties positioned near (relatively) large local farms or established aggregators that could provide a steady supply of produce during the growing season. These county sheriffs' offices could each create a fresh produce contract and solicit bids from local farms.

## G. Department of Youth Services

The Department of Youth Services (DYS) is Massachusetts' juvenile justice agency, responsible for the detention, custody, diagnosis, education, and care of delinquent juvenile offenders.<sup>274</sup> DYS has fifty-six residential facilities, which vary in levels of security.<sup>275</sup> In addition, DYS also provides twenty-six programs to youth living in the community, often through contracts with community-based organizations.<sup>276</sup> DYS has divided the state into five separate regions, and allocates its programs and

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<sup>267</sup> *Welcome to MSA*, MASS. SHERIFFS' ASS'N, <http://www.mass.gov/msa/welcomewalsh-welcome.html> (last visited Jan. 5, 2015).

<sup>268</sup> MASS. DEP'T OF CORRECTION, *supra* note 211, at 13.

<sup>269</sup> *Monthly Count Sheet*, MASS. SHERIFFS' ASS'N (August 2011), *available at* <http://www.mass.gov/msa/docs/count-sheet/20110810countsheet-website.xls> (last visited Jan. 5, 2015).

<sup>270</sup> *Id.*

<sup>271</sup> Data from Bayerl presentation indicates that the sheriffs' offices serve 42,000 clients per year; however it is more likely that there were 42,000 *meals* served, and therefore this figure has been included in the annual meals column. BAYERL, *supra* note 11, at 2. According to the most recent Bureau of Justice Statistics' Census of Jail Facilities, Massachusetts had only 13,214 inmates in local jails in 2006, and therefore presumably served approximately 40,000 meals that year. *See* Stephan, *supra* note 210, at 17.

<sup>272</sup> *See* MASS. OPERAT'L SERVS. DIV., *supra* note 118.

<sup>273</sup> Telephone Interview with Cynthia Bayerl, Nutrition Coordinator, Mass. Dep't of Public Health (April 10, 2013).

<sup>274</sup> *See* MASS. DEP'T OF YOUTH SERVS., PUBLIC INFORMATION PACKET 2013 2 (2013), *available at* <http://www.mass.gov/eohhs/docs/dys/public-info-packet.pdf> (last visited Jan. 5, 2015).

<sup>275</sup> *Programs and Services of the Department of Youth Services (DYS)*, MASS.GOV, <http://www.mass.gov/eohhs/gov/departments/dys/departments-of-youth-services-programs-and-services.html> (last visited Jan. 5, 2015).

<sup>276</sup> *Id.*

services throughout the regions.<sup>277</sup> Each region contains a range of services and facilities of varying security levels, with the goal of serving youth as close to their homes as possible.

In January 2013, there were 836 youth under DYS authority.<sup>278</sup> DYS serves food at approximately sixty-seven sites, serving anywhere from 2,000-6,700 people each day.<sup>279</sup> In 2012, DYS spent \$1.8 million on food products purchased through the prime grocer contract.<sup>280</sup>

### ***Recommendations for the Department of Youth Services***

Local food advocates could conduct additional research to determine how the facilities handle purchasing decisions; in particular, local food advocates can investigate whether food purchasing decisions are made individually by each facility or whether a central procurement division is tasked with these decisions.

## ***H. The Department of Children and Families***

The Department of Children and Families (DCF) is responsible for protecting children from abuse and neglect, as well as strengthening families.<sup>281</sup> It provides programs and services related to foster care and adoption, adolescent outreach and development, sexual abuse and domestic violence, as well as family support and housing stabilization.<sup>282</sup> DCF serves approximately 16,000 meals per year (forty-six per day) at its shelter, the Temporary Home for Women & Children in Boston (Temporary Home),<sup>283</sup> which provides temporary shelter and meals for women and children, as well as meals to men.<sup>284</sup> DCF purchased \$12,000 worth of goods from the prime grocer contract in 2012 (representing 0.1% of total spent on the contract).<sup>285</sup> DCF has its own contract to purchase fresh produce for the Temporary Home, which was worth approximately \$2,000 in FY 2012.<sup>286</sup> As the Temporary Home only houses up to fifty people, its fruit and vegetable needs are small, and produce is purchased two to three times per

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<sup>277</sup> *About Us (DYS)*, MASS.GOV, <http://www.mass.gov/eohhs/gov/departments/dys/mission-statement.html> (last visited Jan. 5, 2015).

<sup>278</sup> See MASS. DEP'T OF YOUTH SERVS., *supra* note 274, at 3.

<sup>279</sup> See BAYERL, *supra* note 11, at 2.

<sup>280</sup> See MASS. OPERAT'L SERVS. DIV., *supra* note 118.

<sup>281</sup> *About the Department of Children and Families*, MASS. DEP'T OF CHILDREN AND FAMILIES, <http://www.mass.gov/eohhs/gov/departments/dcf/about-the-department-of-children-and-families.html> (last visited Jan. 5, 2015).

<sup>282</sup> *Id.*

<sup>283</sup> See BAYERL, *supra* note 11, at 2.

<sup>284</sup> See CITY OF BOSTON ARCHIVES & RECORDS MGMT. DIV., GUIDE TO THE TEMPORARY HOME FOR WOMEN AND CHILDREN RECORDS 2, *available at* [http://www.cityofboston.gov/Images\\_Documents/Guide%20to%20the%20Temporary%20Home%20for%20Women%20and%20Children%20records\\_tcm3-30027.pdf](http://www.cityofboston.gov/Images_Documents/Guide%20to%20the%20Temporary%20Home%20for%20Women%20and%20Children%20records_tcm3-30027.pdf) (last visited Jan. 5, 2015).

<sup>285</sup> See MASS. OPERAT'L SERVS. DIV., *supra* note 118.

<sup>286</sup> See DEP'T OF CHILDREN AND FAMILIES, REQUEST FOR RESPONSE: FRESH PRODUCE — DCFPRODUCE10 2 (2009), *available at* <https://www.commbuys.com> (click on the "Contract & Bid Search" link, select "Bids," input "S118512-vCurrent" into Bid # box and click "Find It," click the "S118512-vCurrent" link, in the list of file attachments click "ProduceRFR10") (last visited Jan. 5, 2015); Email from Luz Rivera, Procurement Liaison, Mass. Dep't of Children and Families (April 17, 2013) (on file with the author).

month.<sup>287</sup> The sole vendor under contract is F&B Fruit and Produce, located in Chelsea, Massachusetts.<sup>288</sup> F&B Fruit and Produce is currently working with the local food wholesaler and distributor Red Tomato, but it is unknown whether any local produce is distributed to the Temporary Home.<sup>289</sup>

### ***Recommendations for the Department of Children and Families***

One short-term strategy to increase local food purchases by DCF is for advocates to reach out to F&B Fruit and Produce to determine whether the company sources locally grown food and to help it connect with farms in Massachusetts. Advocates could also encourage DCF to authorize multiple vendors under the contract, allowing nearby farms to provide those produce items that can be grown in Massachusetts.

## ***I. Department of Veterans' Services***

The Department of Veterans' Services (DVS) connects U.S. veterans in Massachusetts with benefits and services, housing, employment, and training.<sup>290</sup> The agency oversees Veterans Service Officers, who are located in every city and town in Massachusetts. Veterans Service Officers help veterans apply for and receive federal, state, and local benefits and services.<sup>291</sup> DVS operates six shelters and one hospital,<sup>292</sup> including the Soldiers' Homes in Chelsea and Holyoke, which collectively purchase \$1.8 million worth of food from the prime grocer contract alone.<sup>293</sup> DVS serves approximately 1,400 meals per day.<sup>294</sup>

### ***Recommendations for the Department of Veterans' Services***

DVS could increase local food procurement by focusing on purchases made by the Soldiers' Homes in Chelsea and Holyoke, which spent at least \$1.8 million on food-related products in 2012.<sup>295</sup> Local food advocates could work with the agency to create a fresh produce contract, similar to those utilized by DOC and DCF, which would allow the agency to contract with local farmers. As the two homes are located in different areas of the state, the contract solicitation could be drafted so that it authorizes multiple vendors and allows vendors to provide goods to only one location, thus minimizing delivery distance.

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<sup>287</sup> Typical weekly orders consist of twelve apples, three cantaloupes, two heads of lettuce, four green peppers, two red peppers, one pound of tomatoes, a half crate of oranges, one crate of potatoes, and one pound of carrots. See DEP'T OF CHILDREN AND FAMILIES, *supra* note 286, at 2; Rivera, *supra* note 286.

<sup>288</sup> See DEP'T OF CHILDREN AND FAMILIES, S118512-vCURRENT\_OD.XLSX, available at <https://www.commbuys.com> (click on the "Contract & Bid Search" link, select "Bids," input "S118512-vCurrent" into Bid # box and click "Find It," click the "S118512-vCurrent" link, in the list of file attachments click "S118512-vCurrent\_OD.xlsx" and view column AW in "BidHeader" tab) (last visited Jan. 5, 2015).

<sup>289</sup> Email from Simca Horwitz, Mass. Farm to School Project (April 2, 2015), on file with author.

<sup>290</sup> Veterans' Services, MASS.GOV, <http://www.mass.gov/veterans/> (last visited Jan. 5, 2015).

<sup>291</sup> About Veterans' Services, MASS.GOV, <http://www.mass.gov/veterans/about-veterans-services/> (last visited Jan. 5, 2015).

<sup>292</sup> See BAYERL, *supra* note 11, at 2.

<sup>293</sup> See MASS. OPERAT'L SERVS. DIV., *supra* note 118.

<sup>294</sup> See BAYERL, *supra* note 11, at 2.

<sup>295</sup> See MASS. OPERAT'L SERVS. DIV., *supra* note 118.

## VII. CONCLUSION

Chapter 7, Section 23B of the General Laws of Massachusetts serves as an official recognition of the legislature's support for the burgeoning local food movement, as well as acknowledgement of the power of state agencies to support Massachusetts' farming and food economy. State agencies procure large volumes of food each year, and therefore there is great opportunity to promote local food systems by promoting agency procurement of Massachusetts-grown food. These, agencies often serve populations relying—often exclusively—on the state for their meals, and thus state agencies have the ability to improve the health of these individuals by purchasing more food from local farms.

However, Section 23B's implementation has stalled, and there are still a number of barriers and challenges to state agency procurement of Massachusetts-grown food. Implementation of Section 23B remains sluggish due to a lack of information about Section 23B, a lack of tracking and enforcement mechanisms, and a lack of encouragement of local farmers to enroll in existing procurement support programs such as the SBPP.

This project set out to better understand Massachusetts' local procurement law and the potential for increased procurement of locally grown food by state agencies in Massachusetts. Although passage of Section 23B took a small step toward improving the local food system by showing the legislature's interest in supporting the local food economy and increasing access to locally grown food products, the law is not a sufficient mechanism to alter procurement practices by state agencies. Through conversations with local food advocates, aggregators, and agency officials, this report identified current challenges and possible solutions to increase local food procurement. Massachusetts farmers, aggregators, and local food advocates can advocate for a range of improvements in the procurement laws and policies of state agencies to achieve increased local food purchasing. This report provides just a few examples of the range of opportunities available to Massachusetts' agencies. The research and recommendations contained within this report, combined with the growing momentum in the local food movement, should give local food advocates the tools and capabilities to join forces already in motion to achieve the goal of meaningfully increasing local food procurement by state agencies—thereby leading to a stronger, more robust local food system in the future.

# APPENDICES

## Appendix A: Summary of Recommendations

Challenge	Recommendations
<i>Lack of Information about Section 23B</i>	<ul style="list-style-type: none"> <li>➤ Educate state procurement officials about Section 23B through informational materials about basic issues in local food procurement.</li> <li>➤ Host joint networking and informational sessions, bringing together state procurement agents and local farmers.</li> <li>➤ Create a public directory of agency purchasing agents to help advocates and Massachusetts farmers identify local food procurers.</li> <li>➤ Create a directory of Massachusetts farms and aggregators interested in selling to state agencies.</li> <li>➤ Condition the receipt of state funds for community nutrition programs on attendance at mandatory local procurement trainings.</li> </ul>
<i>Lack of Incentive to Comply with Section 23B and Lack of Data about Compliance</i>	<ul style="list-style-type: none"> <li>➤ Establish a tracking mechanism and reporting requirement.</li> <li>➤ Establish a benchmark.</li> <li>➤ Add a preference for regional food products to Section 23B.</li> </ul>
<i>Lack of Participation in Existing Procurement Support Programs</i>	<ul style="list-style-type: none"> <li>➤ Encourage enrollment in the Small Business Purchasing Program.</li> <li>➤ Encourage enrollment in the Supplier Diversity Program.</li> <li>➤ Create a policy establishing a Massachusetts-grown Agricultural Products Preference Program, and require state agencies to give preference to Massachusetts farms and aggregators enrolled in the program.</li> </ul>
<i>Prime Grocer Contract Requires Provision of Locally and Non-Locally Available Goods</i>	<ul style="list-style-type: none"> <li>➤ Split food contracts, such that locally available produce is separated from citrus and other goods that cannot be grown in Massachusetts.</li> </ul>

## ***Appendix B: Massachusetts General Laws, Chapter 7, Section 23B***

***(As amended Oct. 28, 2010)***

(a) Notwithstanding any general or special law to the contrary, and to the extent permitted by federal law, a state agency, authority or trustees or officers of a state college or university designated by such trustees when purchasing products of agriculture as defined in section 1A of chapter 128, including but not limited to, fruits, vegetables, eggs, dairy products, meats, crops, horticultural products or products processed into value added products as part of a Massachusetts farm operation, shall prefer products grown in the commonwealth or products produced using products grown in the commonwealth as well as fish, seafood, and other aquatic products.

(b) To effectuate the preference for those products of agriculture grown or produced using locally-grown products, the state purchasing agent responsible for procuring the products on behalf of a state agency, authority or trustees or officers of a state college or university designated by such trustees shall, in advertising for bids, contracts or otherwise procuring products of agriculture, make reasonable efforts to facilitate the purchase of such products of agriculture grown or produced using products grown in the commonwealth.

(c) The state purchasing agent responsible for procuring the products on behalf of a state agency or authority shall purchase the products of agriculture grown or produced using products grown in the commonwealth, unless the price of the goods exceeds, by more than 10 percent, the price of products of agriculture grown or produced using products grown outside of the commonwealth.

## **Appendix C: Section 23B Compliance Letter from Operational Services Division**



**The Commonwealth of Massachusetts  
Executive Office for Administration and Finance  
Operational Services Division  
One Ashburton Place, Boston, MA 02108-1552**



<http://www.comm-pass.com>

**Deval L. Patrick  
Governor**

**Leslie A. Kirwan  
Secretary**

**Timothy P. Murray  
Lieutenant Governor**

**Ellen M. Bickelman  
State Purchasing Agent**

**To: Department Heads, Chief Fiscal Officers, and General Counsels**

**From: Ellen Bickelman  
State Purchasing Agent**

**Date: January 11, 2007**

**Re: Massachusetts Agricultural Products**

I am writing to inform you of a recently enacted law that establishes a preference for purchasing Massachusetts agricultural products. Chapter 123 of the Acts of 2006 directs the State Purchasing Agent to grant a preference to products of agriculture that are grown or produced using locally grown products. Specifically, Chapter 123 directs those responsible for procuring products on behalf of a state agency or authority (1) to make reasonable efforts to facilitate the purchase of products of agriculture grown or produced using products grown in the Commonwealth and (2) to purchase these products, unless the price of the goods exceeds the price of products of agriculture from outside the Commonwealth by more than 10%.

Products of agriculture are defined to include any agricultural, aquacultural, floricultural or horticultural commodities, the growing and harvesting of forest products, the raising of livestock, including horses, the raising of domesticated animals, bees or fur-bearing animals, and any forestry or lumbering operations. OSD will incorporate this new requirement into statewide procurements for agricultural products and departments must also be in compliance with this new law when conducting procurements for products not on statewide contract that fall within the definition of agricultural products. OSD is in the process of updating the Procurement Information Center (PIC) and will include new language in the Required Specifications document to reflect the requirements of the new law. In the interim, the following language can be referenced in department procurements for agricultural products to ensure compliance with the new preference law:

Required Specifications for Purchase of Agricultural Products - Chapter 123 of the Acts of 2006 directs the State Purchasing Agent to grant a preference to products of agriculture grown or produced using locally grown products. Such locally grown or produced products shall be purchased unless the price of the goods exceeds the price of products of agriculture from outside the Commonwealth by more than 10%. For purposes of this preference, products of agriculture are defined to include any agricultural, aquacultural, floricultural or horticultural commodities, the growing and harvesting of forest products, the raising of livestock, including horses, raising of domesticated animals, bees, fur-bearing animals and any forestry or lumbering operations.

If you have any questions, please contact Bill McAvoy, OSD's General Counsel at 617-720-3327 or [William.mcavoy@state.ma.us](mailto:William.mcavoy@state.ma.us)

Thank you for your attention to this matter.

**Tel: (617) 720-3300**

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**Fax: (617) 727-4527**



## Appendix D: Massachusetts Executive Agencies

Below is a list of the eighty-two Massachusetts Executive Branch agencies.<sup>296</sup> These agencies are subject to Section 23B's local agricultural products preference law, E.O. 509's nutrition standards and E.O. 523's small business purchasing preference, as well as OSD's procurement requirements.

<b>Executive Office for Administration and Finance</b>	Executive Office for Administration and Finance
	Administrative Law Appeals Division
	Appellate Tax Board
	Bureau of State Buildings
	Capital Asset Management and Maintenance Division
	Civil Service Commission
	Department of Revenue
	Developmental Disabilities Council
	George Fingold Library
	Group Insurance Commission
	Human Resources Division
	Information Technology Division
	Massachusetts Office on Disability
	Operational Services Division
	Public Employee Retirement Administration
	Teachers' Retirement System
<b>Executive Office of Education</b>	Executive Office of Education
	Department of Early Education and Care
	Department of Elementary and Secondary Education
	Department of Higher Education
<b>Executive Office of Energy and Environmental Affairs</b>	Executive Office of Energy and Environmental Affairs
	Department of Agricultural Resources
	Department of Conservation and Recreation
	Department of Energy Resources
	Department of Environmental Protection
	Department of Fish and Game
	Department of Public Utilities
	State Reclamation Board
<b>Executive Office of Health and Human Services</b>	Executive Office of Health and Human Services
	Department of Children and Families

<sup>296</sup> This list was compiled based on guidance issued by Operational Services Division (OSD) as well as more recent guidance issued jointly by OSD and the Office of the Comptroller, which we then cross-referenced with the Supplier Diversity Office's Comprehensive Annual Report from FY2012. See MASS. OPERAT'L SERVS. DIV., *supra* note 64, at 44; *Commodities and Services*, Office of the Comptroller and Operational Services Division 4 (Jul. 2004), available at <http://www.mass.gov/osc/docs/policies-procedures/contracts/po-procon-goods-services.doc>; *Operational Services Division Procurement Introduction*, OPERATIONAL SERVS. DIV. 3 (2007), available at [http://www.google.com/url?sa=t&rct=j&q=operational%20services%20divison%20procurement%20introduction&source=web&cd=2&ved=0CD4QFjAB&url=http%3A%2F%2Fwww.mass.gov%2Ffanf%2Fdocs%2Fosd%2Fpic%2Fprocurement-intro.doc&ei=9\\_nAUPmUCI2s0AGM24HQA&usg=AFQjCNGhG44NOTRmrZbDDCD-AY5CtmXwpw](http://www.google.com/url?sa=t&rct=j&q=operational%20services%20divison%20procurement%20introduction&source=web&cd=2&ved=0CD4QFjAB&url=http%3A%2F%2Fwww.mass.gov%2Ffanf%2Fdocs%2Fosd%2Fpic%2Fprocurement-intro.doc&ei=9_nAUPmUCI2s0AGM24HQA&usg=AFQjCNGhG44NOTRmrZbDDCD-AY5CtmXwpw) (last visited Dec. 6, 2012).

	Department of Developmental Services
	Department of Mental Health
	Department of Public Health
	Department of Transitional Assistance
	Department of Veterans' Services
	Department of Youth Services
	Division of Health Care Finance and Policy
	Executive Office of Elder Affairs
	Massachusetts Commission for the Blind
	Massachusetts Commission for the Deaf and Hard of Hearing
	Massachusetts Rehabilitation Commission
	Office for Refugees and Immigrants
	Soldiers' Home in Chelsea
	Soldiers' Home in Holyoke

<b>Executive Office of Housing and Economic Development</b>	Executive Office of Housing and Economic Development
	Department of Business and Technology
	Department of Housing and Community Development
	Department of Telecommunications and Cable
	Division of Banks
	Division of Insurance
	Division of Professional Licensure
	Division of Standards
	Massachusetts Marketing Partnership
	Office of Consumer Affairs and Business Regulation
	State Rating Bureau
	State Rehabilitation Council

<b>Executive Office of Labor and Workforce Development</b>	Executive Office of Labor and Workforce Development
	Department of Industrial Accidents
	Department of Labor and Workforce Development
	Department of Labor Relations
	Joint Labor-Management Committee

<b>Executive Office of Public Safety and Security</b>	Executive Office of Public Safety and Security
	Criminal History Systems Board
	Department of Correction
	Department of Fire Services
	Department of Public Safety
	Department of State Police
	Massachusetts Emergency Management Agency
	Municipal Police Training Committee
	Office of the Chief Medical Examiner
	Parole Board
	Sex Offender Registry Board

<b>Department of Transportation</b>	Department of Transportation
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	Massachusetts Aeronautics Commission
	Merit Rating Board
	Registry of Motor Vehicles
<b>Office of the Comptroller of the Commonwealth</b>	Office of the Comptroller of the Commonwealth
<b>Office of the Governor</b>	Office of the Governor
<b>Other Organizations</b>	Board of Library Commissioners
	Commission Against Discrimination
	Disabled Persons Protection Commission
	Sheriffs' Offices

## Appendix E: Procurement Laws across the United States

### Institutions Covered and Type of Preference

State	Institutions Covered	Type of Preference
Alabama	Agencies, Colleges/Universities	Price Preference, Reciprocity
	<b>Source:</b> ALA. CODE § 41-16-20 (2012); ALA. CODE § 41-16-27 (2012).	
Alaska	Agencies, Colleges/Universities	Price Preference
	<b>Source:</b> ALASKA STAT. ANN. § 36.15.050 (West 2012).	
California	Agencies, Colleges/Universities	Tie-Goes-To-Local
	<b>Source:</b> CAL. GOV'T CODE § 4331 (West 2012).	
Colorado	Agencies, Colleges/Universities	Reasonableness
	<b>Source:</b> COLO. REV. STAT. ANN. §§ 8-18-103, 24-101-301 (West 2012) (but allowing the “governing board of each institution of higher education” to “elect to be excluded from the meaning of ‘governmental body’” such that it will not be subject to the preference).	
Connecticut	Agencies, Colleges/Universities	Tie-Goes-To-Local
	<b>Source:</b> CONN. GEN. STAT. ANN. § 4a-51 (West 2012).	
Florida	Agencies	Tie-Goes-To-Local
	<b>Source:</b> FLA. STAT. ANN. § 287.082 (West 2012), <i>but see</i> FLA. STAT. ANN. § 287.0822 (West 2012) (applying less clearly to agencies).	
Georgia	Agencies, Colleges/Universities	Reasonableness
	<b>Source:</b> GA. CODE ANN. § 50-5-60 (West 2012); GA. CODE ANN. § 50-5-61 (West 2012).	
Hawaii	Agencies	Price Preference, Reciprocity
	<b>Source:</b> HAW. REV. STAT. § 103D-1002 (West 2012); HAW. REV. STAT. § 103D-1004 (West 2012).	
Idaho	Agencies	Tie-Goes-To-Local
	<b>Source:</b> IDAHO ADMIN. CODE r. 38.05.01.001 (2012); IDAHO ADMIN. CODE r. 38.05.01.082 (2012).	
Illinois	Agencies, Colleges/Universities	Price Preference (optional)
	<b>Source:</b> 30 ILL. COMP. STAT. ANN. 500/45-50 (West 2012); 30 ILL. COMP. STAT. ANN. 595/10 (West 2012).	
Indiana	Agencies, Colleges/Universities	Price Preference
	<b>Source:</b> IND. CODE ANN. § 5-22-15-23.5 (West 2012).	
Iowa	Agencies, Colleges/Universities	Tie-Goes-To-Local
	<b>Source:</b> IOWA CODE ANN. § 73.1 (West 2012).	
Kentucky	Agencies, Colleges/Universities	Tie-Goes-To-Local
	<b>Source:</b> KY. REV. STAT. ANN. § 45A.645 (West 2012).	
Louisiana	Agencies, Colleges/Universities	Price Preference
	<b>Source:</b> LA. REV. STAT. ANN. § 38:2251 (2012); LA. REV. STAT. ANN. § 39:1595 (2012); LA. REV. STAT. ANN. § 38:2251.1 (2012).	

Maine	Agencies, Colleges/Universities	Tie-Goes-To-Local
	<b>Source:</b> ME. REV. STAT. TIT. 7, § 212(3) (West 2014); ME. REV. STAT. TIT. 7, § 213 (West 2014).	
Maryland	Agencies, Colleges/Universities.	Price Preference
	<b>Source:</b> MD. CODE ANN., STATE FIN. & PROC. § 14-407 (West 2012).	
Massachusetts	Agencies (optional for Colleges/Universities)	Price Preference
	<b>Source:</b> MASS. GEN. LAWS ANN. ch. 7, § 23B (West 2012).	
Minnesota	Agencies	Reasonableness
	<b>Source:</b> MINN. STAT. ANN. § 16C.02 (2012); MINN. STAT. ANN. § 16C.03 (West 2012); MINN. STAT. ANN. § 16C.12 (West 2012).	
Mississippi	Agencies, Colleges/Universities	Tie-Goes-To-Local
	<b>Source:</b> MISS. CODE. ANN. § 31-7-1 (West 2012); MISS. CODE. ANN. § 31-7-15 (West 2012).	
Missouri	Agencies, Colleges/Universities	Tie-Goes-To-Local
	<b>Source:</b> MO. ANN. STAT. § 34.010 (West 2012); MO. ANN. STAT. § 34.030 (West 2012); MO. ANN. STAT. § 34.070 (West 2012).	
Montana	Agencies, Colleges/Universities	Reasonableness
	<b>Source:</b> MONT. CODE ANN. § 18-4-132 (West 2011).	
New Jersey	Agencies, Colleges/Universities	Reasonableness
	<b>Source:</b> N.J. STAT. ANN. § 52:32-1.6 (West 2012).	
New York	Agencies, Colleges/Universities	Benchmark
	<b>Source:</b> N.Y. STATE FIN. LAW § 165 (McKinney 2012).	
North Carolina	Agencies, Colleges/Universities	Tie-Goes-To-Local
	<b>Source:</b> N.C. GEN. STAT. ANN. § 143-59 (West 2012).	
Ohio	Agencies, Colleges/Universities	Price Preference
	<b>Source:</b> OHIO ADMIN. CODE 123:5-1-01 (2012); OHIO ADMIN. CODE 123:5-1-06 (2012) (allowing for a price preference to be applied to bordering states).	
Oklahoma	Agencies, Colleges/Universities	Reciprocity, Tie-Goes-To-Local
	<b>Source:</b> OKLA. STAT. tit. 74, § 85.2(34) (2014); OKLA. STAT. tit. 74, § 85-17A (2014).	
Oregon	Agencies (unclear if applies to Colleges/ Universities)	Tie-Goes-To-Local, Price Preference (optional), Reciprocity (optional)
	<b>Source:</b> OR. REV. STAT. ANN. § 279A.120 (West 2012); OR. REV. STAT. ANN. § 279A.128 (West 2012).	
Pennsylvania	Agencies (unclear if applies to Colleges/ Universities)	Tie-Goes-To-Local
	<b>Source:</b> 4 PA. CODE § 7a.41 (2013).	
Rhode Island	Agencies, Colleges/Universities	Tie-Goes-To-Local
	<b>Source:</b> R.I. GEN. LAWS ANN. § 37-2-8 (West 2013).	

South Carolina	Agencies, Colleges/Universities	Price Preference
	<b>Source:</b> S.C. CODE ANN. § 11-35-1510 (2012); S.C. CODE ANN. § 11-35-1520 (2012); S.C. CODE ANN. § 11-35-1524 (2012).	
Tennessee	Agencies, Colleges/ Universities	Tie-Goes-To-Local
	<b>Source:</b> TENN. CODE ANN. § 12-3-1102(6) (2014); TENN. CODE ANN. § 12-3-1113(a) (2014).	
Texas	Agencies, Colleges/ Universities	Tie-Goes-To-Local
	<b>Source:</b> TEX. GOV'T CODE ANN. § 2155.444 (West 2012).	
Utah	Agencies, Colleges/Universities	Tie-Goes-To-Local, Reciprocity
	<b>Source:</b> UTAH CODE ANN. § 63G-6a-104 (2014); UTAH CODE ANN. § 63G-6a-1002 (2014).	
Vermont	Agencies, Colleges/Universities	Tie-Goes-To-Local
	<b>Source:</b> VT. STAT. ANN. tit. 29, § 909 (West 2012).	
Virginia	Agencies, Colleges/Universities	Tie-Goes-To-Local
	<b>Source:</b> VA. CODE ANN. § 2.2-4301 (West 2013); VA. CODE ANN. § 2.2-4324 (West 2012).	
Washington	Agencies, Colleges/Universities	Reciprocity
	<b>Source:</b> WASH. ADMIN. CODE § 236-48-085 (2012); WASH. ADMIN. CODE § 200-300-075 (2012).	
Wyoming	Agencies, Colleges/Universities	Tie-Goes-To-Local, Price Preference (optional)
	<b>Source:</b> WYO. STAT. ANN. § 16-6-105 (West 2012).	

### Working Groups to Assist with Increasing Local Food Procurement

State	Title	Specific Tasks of Working Group
Illinois	Local Food, Farms and Jobs Council	Includes assisting state agencies, State-owned facilities, and other entities with the purchase of local farm or food products and with tracking and reporting of such purchases in order to meet the goals established in the statute.
	<b>Source:</b> 30 ILL. COMP. STAT. ANN. 595/10 (West 2012).	
Iowa	Local Food and Farm Program	Includes increasing consumer and institutional spending on Iowa-produced and marketed foods.
	<b>Source:</b> IOWA CODE ANN. § 267A.1 (West 2012).	
Maine	State Food Purchasing Coordinator	To assist in the development of connections between state and school purchasers, Maine food producers and brokers and wholesalers of food.
	<b>Source:</b> ME. REV. STAT. tit. 7, § 214 (2011).	
Massachusetts	Massachusetts Food Policy Council	Includes developing recommendations to advance the following food system goals: the development and promotion of programs that deliver healthy Massachusetts-grown foods to Massachusetts residents, through programs such as (1) school meals, summer meals, and other child and adult care

		programs; and, (2) increased institutional purchases of Massachusetts-grown foods and other programs to make access to healthy Massachusetts products affordable.
	<b>Source:</b> MASS. GEN. LAWS ANN. ch. 20, § 6C (West 2012).	
Vermont	The Farm-to-Plate Investment Program, part of Sustainable Jobs Fund Program; Rozo-McLaughlin Farm-to-School Program	Includes assisting Vermont producers to increase their access to commercial markets and institutions, including schools, state and municipal governments, and hospitals.
	<b>Source:</b> VT. STAT. ANN. tit. 6, § 4724 (West 2012).	

### Reports to Track Local Food Procurement

State	Details of Report	Demonstrable Progress Required?
Colorado	Must report any cost increases associated with the provisions of the procurement section.	No
	<b>Source:</b> COLO. REV. STAT. ANN. § 8-18-103(4) (West 2012).	
Illinois	Task force has set goals, but has not indicated whether agencies are responding to information requests.	No
	<b>Source:</b> 30 ILL. COMP. STAT. ANN. 595/10 (West 2012).	
Iowa	Local Food and Farm Program submitted a financial report to Iowa Legislature in June 2012, which set goals for tracking the purchase of Iowa-grown foods by agencies and institutions.	No
	<b>Source:</b> IOWA CODE ANN. § 267A.7 (West 2012).	
Kentucky	Must report annual expenditures.	No
	<b>Source:</b> KY. REV. STAT. ANN. § 45A.645 (West 2012).	
New York	Must submit a report annually before December 1.	Yes, must track implementation of local food procurement law.
	<b>Source:</b> N.Y. STATE FIN. LAW § 165(4) (McKinney 2013).	
Pennsylvania	Must submit a report to the Pennsylvania Department of Agriculture before January 1.	No
	<b>Source:</b> 4 PA. CODE § 7a.44 (2013).	
Vermont	Must submit a report as part of Vermont's Farm-to-Plate investment program.	No
	<b>Source:</b> VT. STAT. ANN. tit. 15A, § 329 (West 2012).	

## **Appendix F: July 2014 Food Order Guides**

According to the July 2014 food order guides for the three main vendors listed in the discussion of the prime grocer contract, the below list of fruits, vegetables and eggs are available for purchase from the listed subvendors (this list includes only unprocessed or minimally processed products):<sup>297</sup>

### **Performance Food Group**

- Allens (blackeyed peas, cut green beans, creamed corn)
- Alta Cucina (plum tomatoes)
- Ang Mia (crushed tomatoes)
- Arc Gold (butternut squash)
- Assoluti (diced tomatoes)
- Atalanta (grape leaves)
- B&G (dill pickles)
- Bella Ro (tomato puree, beans)
- Brady FA (blueberries)
- C&F Food (lentils, beans, split peas)
- Chill RP (chopped spinach)
- Cool Crisp (peppers, banana peppers)
- Cosmos (chopped garlic)
- Cul Selc (edamame)
- Del Dest (peppers)
- Fineline (chopped spinach)
- Full Red (diced tomatoes)
- Furmanos (beans, crushed tomatoes)
- Goya (mango, peas)
- Hanover (pickled beets)
- Idahoan (potatoes)
- Hunts (tomato puree)
- Libby P (pumpkin)
- Magellan (pineapples)
- Mancini (peppers)
- Nat Pot (potatoes)
- Nonparel (mixed vegetables, broccoli, strawberries, baby carrots, sliced carrots, corn, peas, cut green beans, Brussels sprouts, beans, zucchini squash, cauliflower)
- Noreast (potatoes, sliced apples, sliced peaches, diced pears, olives, pineapples, diced peppers)
- Norpac (corn, peas, carrots)

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<sup>297</sup> On file with the author.

- Packer (corn, beans, mushrooms, strawberries, broccoli, spinach, peas, mixed fruit, peppers, pineapples, diced pears, diced peaches, carrots, oranges)
- Pembroke (pears)
- Redsto (potatoes)
- Regal (cauliflower)
- Regal Crown (pickles)
- Roland (artichoke hearts, baby corn, water chestnuts, peppers, oranges)
- Roma (peppers, crushed tomatoes, olives)
- Rosarita (peppers)
- Roast Works (peppers, corn)
- Schwartz (peppers, pickles)
- Simplot (strawberries, sliced apples, avocados, squash)
- Simplot Classic (sliced peaches, green beans, avocados)
- SNY Farm (mixed vegetables, corn, carrots, beets, waxed beans, green beans)
- Stapleton (prunes)
- Suzy Bel (pureed tomatoes)
- Sweet Things (sweet potatoes)
- Tamara (strawberries)
- West Creek (sliced apples, beans, broccoli, cauliflower, pickles, sliced peaches, mixed fruit, corn, diced carrots, peppers, tomatoes, peas, collard greens, onions, sliced pears, green beans, mixed vegetables)
- Wyman (cranberries, raspberries, blueberries)

#### **US Foods**

- Driscoll Strawberries (strawberries)
- El Pasado (beans)
- Harvest VL (sliced apples, corn, beans, tomatoes, frozen green beans, frozen broccoli, frozen baby carrots, frozen carrots, frozen cauliflower, frozen corn, frozen peas)
- Intl. Gold (pineapples)
- Intl. Green (peppers)
- Mon-D (apricots, beets, creamed corn, mixed fruit, olives, peaches, diced pears, peppers, potatoes, sweet potatoes, prunes, beans, sliced tomatoes, mixed vegetables)
- Monarch (green beans, peppers, diced tomatoes, sliced apples, green beans, frozen broccoli, corn on the cob, frozen corn, frozen peas, frozen carrots, dill pickles, spinach, squash, butternut squash, sliced carrots, zucchini)
- Nemco (pears)

- Packer (mixed fruit, diced peaches, pears, pineapples, avocados, bananas, cabbage, cantaloupe, carrots, cucumber, eggplant, ginger root, grapefruit, honeydew, kiwi, peppers, raspberries, butternut squash, watermelon)
- Popeye (spinach)
- Reichel (apples)
- Roland (oranges)
- Roseli (diced tomatoes, pureed tomatoes)
- Sunrich (cantaloupe, mixed fruit, grapefruit, honeydew, pineapples)
- Cross Valley (mixed fruit, apples, green beans, blackberries, blueberries, broccoli, Brussels sprouts, baby carrots, carrots, celery, cucumber, grapes, lemon, lettuce, mushroom, onion, orange, peppers, pineapples, potatoes, spinach, salad mix, squash, tomatoes, zucchini)
- Sunsweet (prunes)

**Reinhart<sup>298</sup>**

- No vendor specified (apples, bananas, beans, beets, cabbage, carrots, cucumbers, honeydew, grapefruit, kale, lettuce, onions, oranges, peaches, pineapples, raspberries, spinach, squash, tomatoes, turnips)

**Available through All Three Vendors**

- Dole (mixed fruit, pineapples, strawberries, fruit salad, diced peaches)

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<sup>298</sup> Order guide does not specify month. Accessed July 2014.