



SHELLFISH ADVISORY PANEL

3PM

Monday, November 20, 2023

Via [Zoom](#)

Webinar ID: 869 4667 3381

Passcode: 848397

1. Introductions and Remarks (3:00 – 3:30)
 - a. Director's Remarks
 - b. Review of November 20, 2023 Business Meeting Agenda
 - c. Review and Approval of April 27, 2023 Draft Business Meeting Minutes
2. Presentation from MEPA on Special Review Procedure for Aquaculture (3:30 - 4:00)
3. DMF Shellfish Program Updates (4:00 – 5:30)
 - a. Constable Training Initiative
 - b. FDA Review Update
 - c. Growing Area Re-definition/Re-classifications
 - d. Shellfish Regulatory Updates
 - e. Surf Clam Management Update
4. Presentation on Upgrading Biotoxin Testing Methods (5:30 – 6:00)
5. Other Business (6:00 – 6:30)
 - a. 2024 Meeting Dates
 - b. Panel Member Comments
 - c. Public Comments
 - d. Adjourn

All times provided are approximate and the meeting agenda is subject to change.
The Shellfish Advisory Panel may amend the agenda at the start of the business meeting.

Future Meeting Dates

TBD

SHELLFISH ADVISORY PANEL

April 27, 2023

Via Zoom

In attendance:

Shellfish Advisory Panel: Daniel McKiernan, Chair (DMF); Lisa Rhodes (DEP); Sean Bowen (DAR-Proxy); Josh Reitsma, Allen Rencurrel, Dale Leavitt, Mike Moore, Mike DeVasto, and Amy Anne Croteau

Absent: Jim Abbot; Ron Bergstrom; Bob Colby; Mike Trupiano; Rebecca Rausch; William Doyle; Renee Gagne; Seth Garfield; Alex Hay ; Stephen Kirk; *Lisa Engler; John Peters; and Mindy Domb.*

Division of Marine Fisheries: Bob Glenn, Jeff Kennedy, Thomas Shields, Chrissy Petitpas, Jared Silva, Julia Kaplan, Matt Camisa, Gabe Lundgren, Ryan Joyce, and Scott Schaffer

Department of Public Health: Michael Moore, Eric Hickey

Members of the Public: Massachusetts Representative Paul Schmid, Mark Begley, Beth Gibbons, Suzanne 'Phil' Phillips, Greg Morris and Chloe Starr (Aquacultural Research Corporation).

INTRODUCTIONS AND ANNOUNCEMENTS

DMF Director Daniel McKiernan chairs the Shellfish Advisory Panel (SAP) and called the meeting to order. He welcomed everyone to the meeting and thanked attendees for making the commute.

REVIEW OF APRIL 27, 2023 BUSINESS MEETING AGENDA

No changes to the agenda were requested.

REVIEW AND APPROVAL OF MARCH 2, 2023 DRAFT BUSINESS MEETING MINUTES

Lisa Rhodes stated she emailed a change regarding the comment she made about a more accurate map depicting wetland resource areas to Julia Kaplan. Julia stated she would make the change.

Chairman McKiernan requested a motion to approve the amended March 2, 2023 business meeting minutes. Dale Leavitt made a motion to approve the amended meeting minutes. Josh Reitsma seconded the motion. A roll call vote was taken and the motion passed unanimously.

CONTINUING BUSINESS FROM MARCH 2023 BUSINESS MEETING

Primary Purchase Variance for Barnstable

Chrissy Petitpas discussed crowding at Blish state boat ramps which have been causing public safety concerns when harvesters land oysters. Eric Hickey and Mike Moore were asked to speak to the subject. Mike Moore stated DPH is looking into the issue, but stated that he believes this issue is essentially outside of DPH's regulatory purview because DPH doesn't issue permits to municipalities. There was further discussion among Amy Croteau, Mike Moore, Eric Hickey, Mike DeVasto and DMF staff regarding logistics issues and regulations that prove limiting regarding shellfish harvesters landing at the Blish Ramp and making the dealer transaction at the town-owned and managed "grassy knoll".

Seed Supply, Mitigation, and Support

Dan McKiernan asked Josh Reitsma to speak to the issue of seed supply. Increased demand for seed without increase in supply, hatchery crashes, and poor performance and mortality in the field nurseries were three major topics that were covered as possible circumstances for the insufficient seed supply. Josh stated that a post-doc at WHOI is trying to collect some data and investigate poor growth and mortality of seed in nursery areas and determine possible solutions. Funding opportunities for the post-doc were discussed amongst Josh and Dan McKiernan, and Josh stated the post-doc is currently funded for 18 months. Dan inquired about whether the state should assist in hatchery products. Dale Leavitt stated more hatcheries would help alleviate the shortages. A representative from Aquaculture Research Corp. was present at the meeting and stated they are maxed out in regard to space for production. She noted that two spawns were lost in a row which contributed to a shortage.

There was overall concern about the instability of seed supply each year, and whether the lack of supply limits production was discussed. There was consensus that the lack of seed supply has been limiting production for a few years now. The effects carry over to wholesale dealers as well since there are no oysters to meet the demand.

Different options for hatcheries were discussed, some of these options included the Hughes Hatchery on the Vineyard, but it was determined that it is primarily used for local municipal seed supply on the Vineyard. Additional options included potential partnerships with universities (UMass, Mass Maritime Academy), and federal funding to mitigate the seed shortage was also discussed.

The Panel came to the conclusion that a sub-committee would be a sufficient starting point. Dale Leavitt, Sean Bowen, and Josh Reitsma volunteered to be a part of the subcommittee. Josh also asked for ARC to sit in on the meeting as they play an integral role in seed supply in Massachusetts.

Update on Sub-Committees

Tom Shields explained a recently distributed survey regarding aquaculture license site transfers. He explained that it was distributed to 34 municipalities and DMF has received ten responses thus far. He stated he plans to call the remaining municipalities

in hopes of increasing the response rate with the ultimate goal of producing a white paper that compares what each town does regarding aquaculture license site transfers.

Dan McKiernan stated that DMF is planning to bring an update regarding the bulk tagging sub-committee at the fall meeting. He stated the extension will allow for DMF to look into the issue further and work more closely with dealers on the issue.

DMF SHELLFISH PROGRAM UPDATES

Review of March 2023 ISSC Meeting

Jeff Kennedy provided the Panel with an overview of the ISSC Meeting which included proposals that stemmed from each task force. Chrissy Petitpas spoke to selected individual proposals from Task Force I and described which proposals were adopted, sent to the committee, and which proposals had no action taken. Chrissy explained that mooring area designation and reclassification proved to be hot topics at the meeting. and further explained implications that came from adopted proposals. Eric Hickey then discussed the proposals from Task Force II that were adopted, sent to committee, and proposals where no action was taken. Jeff Kennedy then spoke to Task Force III proposals that were adopted at the ISSC meeting.

Dan thanked Jeff, Chrissy, and Mike for their presentation and noted that the SAP likely will not hear a similar presentation for about a year and a half as this was the first ISSC meeting since 2019.

Vp. Control Plan Update

Chrissy provided the SAP with a Vp. Control Plan Update. She gave a background of Vibrio bacteria as well as the history of vibrio illnesses in Massachusetts. Chrissy highlighted the primary change in the control plan this year which is in regard to icing. It was a change in the language from inches of ice around product to a 'continuous layer' around the product leaving the discretion to the enforcement officer. Chrissy then provided the SAP with an overview of the 2022 vibrio season summary and discussed reported illnesses. Chrissy welcomed questions from the Panel.

Mike DeVasto stated that due to the low number of illnesses compared to the nearly 55 million oysters landed, the management plan is working.

DMF Shellfish Regulations Update

Jared Silva provided the SAP with updates regarding shellfishing regulations. He described some housekeeping items and stated that there will likely be a public hearing within the next six months and stated the changes to any regulations could be classified as non-substantive.

PRESENTATION ON COMMERCIAL SHELLFISH LANDINGS

Scott Schaffer provided the SAP with a presentation on shellfish landings. He discussed state waters landings and values for all shellfish. Scott then described the trends for the

shellfish species and explained how Covid impacted the landings for each species. He welcomed questions from the Panel.

Mike DeVasto inquired about the value of the oysters. Scott stated he could follow-up with tables via email after the meeting.

OTHER BUSINESS

Meeting Schedule

Dan McKiernan stated there will likely be a meeting of the aquaculture license site subcommittee meeting at the end of the summer. He also stated he will be in touch with the members of the bulk tagging sub-committee at the end of the summer. Dan concluded his comments by stating the next full SAP meeting will likely be in October.

Panel Member Comments

Mike DeVasto discussed personal liability regarding aquaculture license site operations and pointed out the legal issues that come with the liability. He noted that if the name the business or corporation could be placed on a site license that liability would fall on the business and personal liability would be limited.

Public Comments

Suzanne Phillips thanked DMF and advocated for a virtual option for meetings going forward.

ADJOURN

Chairman McKiernan requested a motion to adjourn the March SAP meeting. **Josh Reitsma made a motion to adjourn the April SAP meeting. The motion was seconded by Mike DeVasto. The motion was approved by unanimous consent.**

MEETING DOCUMENTS

- April 27, 2023 SAP Business Meeting Agenda
- March 2, 2023 SAP Draft Business Meeting Minutes

UPCOMING MEETINGS

DRAFT



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THOMAS O'SHEA
Commissioner

DANIEL J. MCKIERNAN
Director

MEMORANDUM

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

FROM: Daniel J. McKiernan, Director 

DATE: November 9, 2023

SUBJECT: **Updates to Shellfish Sanitation, Harvest, Handling, and Management Regulations**

Overview

DMF seeks to make several minor modifications to its shellfish regulations [322 CMR 6.00 and 16.00] for the upcoming 2024 fishing season. These proposed adjustments respond to routine changes in the *Vibrio* Control Plan, observed deficiencies in the regulatory code identified during recent enforcement and compliance efforts, and housekeeping efforts to improve the organization of state regulations. In summary, the changes should improve the management of shellfish fisheries in the Commonwealth benefiting both industry and public health. DMF will also review this regulatory proposal with the Shellfish Advisory Panel (SAP) at its upcoming fall 2023 meeting. I anticipate these proposals will proceed to public hearing this winter for final MFAC approval and implementation by springtime 2024.

Proposals

Vibrio Management Plan for the Harvest and Handling of Oysters

State regulations at 322 CMR 16.07 establish the protocols and performance standards consistent with the state's *Vibrio parahaemolyticus* (*Vp*) Control Plan, required by the National Shellfish Sanitation Program and approved annually by the Massachusetts *Vibrio* Working Group (DMF, DPH and MEP) to minimize the public health risk associated with *Vp* and the consumption of raw oysters. This includes a variety of risk controls during harvest and handling designed to minimize temperature abuse to prevent elevating risk and record keeping requirements to verify compliance with risk controls and aid in illness traceback.

The existing regulations generally require oysters to be adequately iced prior to leaving the point of landing and within two hours from time of harvest or first exposure in an intertidal area. This requirement is more stringent—requiring adequate icing within one hour from time of harvest or first exposure in an intertidal area—for certain shellfish growing areas during the peak summertime period (July 1 – September 15). This is done to prevent temperature abuse and inhibit the growth and proliferation of the *Vp* bacterium in oysters.

The current regulation prescribes several methods to comply with this adequate icing requirement. This includes: (1) surrounding mesh bags of oysters with at least two inches of ice between each bag and between the bags and the sides and bottom of an icing container and applying three inches of ice on top of the mesh bags; (2) placing loose oysters into an icing container with at least two inches of ice between the loose oysters and the sides and bottom of the icing container and applying three inches of ice on top of the

loose oysters; or (3) fully submerging oysters into an icing container holding an ice slurry or cold water dip that is at or below 45°F.

In recent years, industry has worked through DMF to adopt less prescriptive standards, and in 2023, the less prescriptive standards were adopted in the *Vp* Control Plan. This included requiring: (1) mesh bags containing oysters be completely surrounded by ice, including at the bottom of the container and each level of bags, so that each bag is continuously and completely covered with ice; (2) loose oysters in a container of ice be completely surrounded by ice, including at the bottom of the container and each level of bags, so that each bag is continuously and completely covered with ice; and (3) exempting harvesters from icing requirements if the primary buyer takes on the burden of icing at the landing site and within the time-to-icing window.

Unfortunately, given the 2023 *Vp* Control Plan was not approved and implemented until May 18, 2023, DMF was unable to amend its regulations for the current *Vp* Control Season. Rather, DMF committed to industry it would update its regulations for the 2024 season. This proposal seeks to make the modifications to the icing regulations consistent with this commitment.

Night Closures

Historically, night fishing for shellfish has been prohibited to prevent non-compliance with the state's sanitary harvest and handling requirements to protect public health, as well as local and municipal controls for managing the stock. Such prohibitions restrict fishing effort to daytime hours only so that the activity can be more closely monitored and patrolled for compliance. This has been accomplished through a layering of state laws and local regulation. State law at G.L. c. 130, §68 prohibits the taking or digging of shellfish from one-half hour after sunset to one-half hour before sunrise from any waters licensed as an aquaculture site and requires an aquaculture licensee to forfeit their license site should they violate the rule. Additionally, state regulations at 322 CMR 4.06 prohibit night fishing with mobile gear, which would apply to various state managed commercial shellfish fisheries (e.g., bay quahog dredge, surf clam and ocean quahog dredge). However, there is not a corollary state rule at G.L. c. 130 or 322 CMR 16.00 that blanketly prohibits the wild harvest of shellfish during nighttime hours. Rather, we rely on municipalities to enact such management controls under their home rule authority at G.L. c. 130, §52.

With this in mind, there is some logic in adopting such a provision in the state's commercial shellfish regulations. The creation of a uniform state-wide standard for commercial fishers would enhance enforcement and compliance. Additionally, it would promote public health by allowing state criminal and civil penalties and administrative sanctions to be applied in instances of non-compliance and enabling the Massachusetts Environmental Police to enforce night commercial shellfish fishing closures.

Additionally, the citation in our bay quahog dredge regulation referencing the night fishing closure for mobile gear needs to be updated.

Sanitary Icing of Shellfish

There is some regulatory ambiguity regarding the sanitary icing of shellfish. DMF regulations at 322 CMR 16.02 define icing as meaning "to apply ice made from a DMF approved potable water source to shellfish for temperature control". Additionally, DMF regulations at 322 CMR 16.04 prohibit the icing of shellstock with ice obtained from any source other than an approved source that uses potable water and properly maintained ice machines. In their totality, the regulatory intent is for the rules to apply to all shellstock under all circumstances. The agency's interpretation is consistent with the National Shellfish Sanitation Program Model Ordinance [§II, c. VIII.02.H.(1)], which specifies "any ice used in storage or cooling of shellfish during harvest shall be made from a potable water source..." with the term 'harvest' being defined as "the act of removing shellstock from growing areas and its placement on or in a manmade conveyance or other means of transport."

However, some aquaculturists have argued the regulations should more narrowly apply to market bound shellfish only. This matter came to a head this past winter when certain aquaculture interests on Cape Cod were observed using skating rink ice for overwintering shellfish. They argued this activity was lawful because: (1) the regulatory section at 322 CMR 16.04 is titled “The Sanitary Harvest, Handling, and Transportation of Market Bound Shellfish” and this titling therefore precludes the application of the regulations therein to any culture activities; and (2) they argue that 14-day re-submergence requirement post overwintering would provide the shellstock with the opportunity to purge itself of any contaminants.

DMF responded in writing to the Massachusetts Aquaculture Association of February 1, 2023 (attached). In summary, the letter stated DMF’s definition of icing at 322 CMR 16.02 is broad and would require potable ice be applied to shellfish under all circumstances; stated that ice generated from resurfacing of a staking rink and scraped from a parking lot does not meet potable water standards; expressed concerns that such has likely been exposed to biological and industrial contaminants and other potential adulterants and that application of this ice to shellstock runs counter to safe food handling practices and could erode public confidence; the 14-day re-submergence requirements were not intended to address the purification of shellstock adulterated in this manner and there are no studies into the purification process that would safely justify a re-submergence accommodation in this scenario. Additionally, the letter stated that the use of salvaged rink ice points to a critical need to increase the availability of affordable and clean ice and DMF would work with the industry in such endeavors.

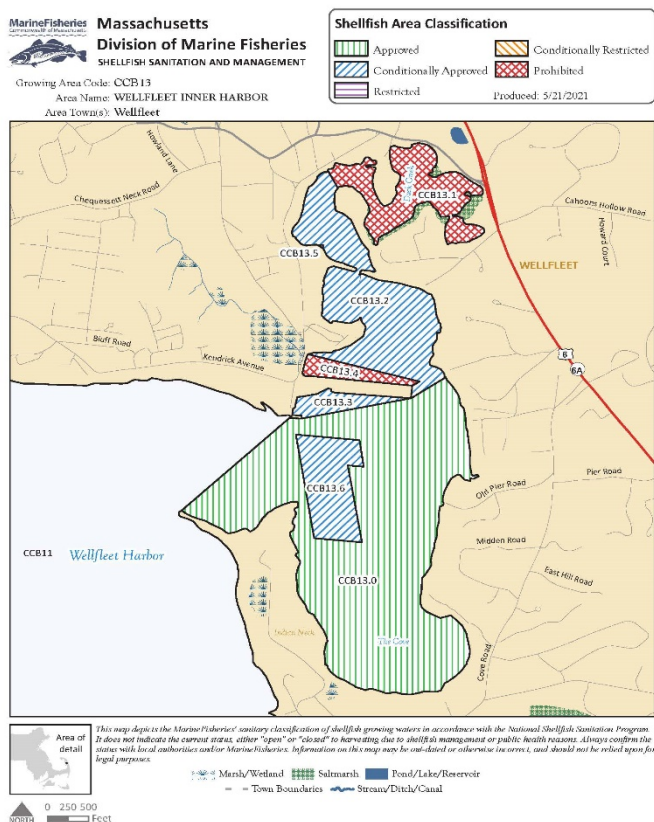
To eliminate any remaining confusion on this subject, DMF intends to amend the regulatory language at 322 CMR 16.00 so that it is clear that icing standards apply to all shellstock under all circumstances.

Shellfish Tagging

Many shellfish growing areas in our state contain sub-areas with different water quality classifications. For instance, the highly productive shellfish growing area CCB13 – Inner Wellfleet Harbor (Figure 1) contains waters that are classified as “Approved”, “Conditionally Approved”, and “Prohibited”. As such, there are three different standards affecting shellfish harvest within CCB13 depending on the precise geographical location.

With regards to harvest location, Massachusetts’ shellfish harvester tagging regulations at 322 CMR 16.05 require the harvester tag contain “the shellfish growing area name and number from where the shellfish was harvested.” This does not adequately specify that the sub-area must be identified. We attempt to further interpret the regulation through the annual [Shellfish Harvest, Handling, and Transport Affidavit](#), which all commercial shellfish permit holders must sign, that states the tag must contain the “most specific shellfish area name and number.” Even still, it is not

Fig. 1 – Cape Cod Bay 13 – Inner Wellfleet Harbor



uncommon for commercial fishers to list only the primary shellfish growing area. This unnecessarily confounds the efficacy of the shellfish tagging program and may inadvertently enhance the public health risk associated with consuming shellfish.

Accordingly, I seek to amend the regulatory language at 322 CMR 16.05 to further specify the harvester tag contain the most specific shellfish area name and number. Implementing this will require harvester add some additional information onto their shellfish tags and compliance will necessitate outreach and education by DMF, the Massachusetts Environmental Police, and local shellfish authorities. However, I think this adjustment, while minor, is critical to implementing a sound shellfish harvester tagging program that is consistent with the National Shellfish Sanitation Program Model Ordinance. Note that the Model Ordinance's guidance documents for shellstock tagging [§IV c. III.04] state the harvester tag must include, "the most precise identification of the harvest location or aquaculture site as is practicable."

Moderately Contaminated Shellfish

In Massachusetts there is a commercial fishery for soft-shell clams that occurs in certain shellfish growing areas around Boston Harbor and the Merrimack River that are classified as Conditionally Restricted. The sanitary survey for a Conditionally Restricted area demonstrates shellfish contain a limited degree of contamination at all times. This commercial fishery is conducted in accordance with state law at G.L. c. 130, §75 and DMF's implementing regulations at 322 CMR 7.02 and 10.00.

In effect, we permit Master Diggers—who are bonded to assure compliance with the regulations—and may engage in the harvest, possession, transportation, and ultimately the sale of moderately contaminated shellfish. Additionally, Master Diggers may employ and supervise permitted Subordinate Diggers authorized to harvest moderately contaminated shellfish and possess it at the landing site for sale to a Master Digger. Following harvest, the Master Digger is to arrange the transport of the moderately contaminated shellfish to DMF's depuration facility in Newburyport and then from our depuration facility for sale into commerce.

DMF manages the acquisition and throughput of moderately contaminated shellfish at the depuration plant through a plant schedule. While state regulations do not specifically require such a schedule, we enforce it through permitting rules at 322 CMR 7.02 coupled with the strict transport and holdover rules at 322 CMR 10.00. To enhance the transparency and enforceability of our regulatory program, I intend to amend 322 CMR 10.00 to specifically require Master Diggers (or their transport agents) to adhere to DMF's Shellfish Plant Digging Schedule.

Previously, DMF discussed recodifying its moderately contaminated shellfish regulations within its Shellfish Harvest and Handling regulations at 322 CMR 16.00. However, given uncertainties surrounding the fishery and the depuration plant, I am not going to endeavor to make this change at this time. Accordingly, the moderately contaminated shellfish regulations will remain at 322 CMR 10.00.



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MEMORANDUM

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

FROM: Daniel J. McKiernan, DMF Director 

DATE: November 9, 2023

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

Introduction

In 2007, the Town of Provincetown, through its Conservation Commission (“ConCom”) promulgated regulations prohibiting hydraulic dredging for surf clams pursuant to its authority under the Wetlands Protection Act (G.L. c. 131, §40). Since that time, I have been involved in internal and external discussions concerning the ongoing challenges where state regulated commercial fishing activities—particularly hydraulic surf clam dredge fishing—are and may be constrained by the Wetlands Protection Act (WPA) and local ConComs. This memorandum serves to provide the SAP and MFAC with background information on the management of surf clams in Massachusetts; an overview of the application of the WPA to commercial fisheries; an update on a Notice of Intent¹ (NOI) filed by a DMF-permitted surf clam dredge vessel to fish in Provincetown waters in 2022; as well as my thoughts on how to move forward.

Background on State Management of Surf Clam Fishery

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

In 1982, the Massachusetts legislature amended G.L. c. 130, §52² to constrain home rule over the management of commercial surf clam (or sea clam) and ocean quahog fisheries. Instead, management

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

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

authority over these shellfish species was bestowed on DMF and its MFAC³, with an allowance for municipal involvement through the development of regional management plans among municipalities approved by DMF. This action was taken in response to the perceived negative impacts of municipalities developing discrete commercial surf clam and ocean quahog management programs. The commercial surf clam and ocean quahog fishery is conducted predominantly by industrial scale vessels using hydraulic dredge gear and moving from area to area to exploit the available resource. The balkanized management approach—with each municipality potentially regulating and permitting the fishing activity—made it unduly onerous to participate in this mobile commercial fishery occurring state-wide and in adjacent federal waters. The legislature preferred a more streamlined approach and determined it was in the best interest of the Commonwealth to provide management authority over the commercial surf clam and ocean quahog fishery to DMF to allow for a state-wide management program.

Consequently, in the early 1980s DMF and the MFAC developed and implemented new commercial surf clam and ocean quahog management regulations (322 CMR 6.08) and established regulated fishery permit endorsements for the use of surf clam and ocean quahog dredge gear (both hydraulic and dry dredges)⁴. These regulations focus on size and catch limits for surf clams and ocean quahogs; constraints on contaminated harvest of surf clams and ocean quahogs; restrictions on the use of surf clam and ocean quahog dredge gear; and time area closures affecting the use of dredge fishing gear to ameliorate user group conflicts and environmental concerns, including closures in some nearshore waters that protect areas where eel grass and juvenile fish habitat may occur⁵. These regulations have been amended over time on an as-needed basis to address emerging management challenges.

Application of Wetlands Protection Act to Commercial Fisheries

Under current case law interpreting the WPA, the state's Department of Environmental Protection (MassDEP) or local ConComs may regulate by issuing orders of conditions to control the use of hydraulic surf clam and ocean quahog dredge gear in wetland resource areas⁶. In *Aqua King Fishery, LLC v. Conservation Commission of Provincetown*, 91 Mass. App. Ct. 712, 714 (2017), the appeals court held that a local regulation⁷ prohibiting hydraulic dredging without filing an NOI with the local ConCom was invalid because it purported to regulate the commercial management of sea clams, contrary to G.L. c. 130,

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

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

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

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

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

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

§ 52. The court went on to hold that even though DMF regulates commercial sea clamming, nothing prohibited further regulation by other authorities. *Id.* at 715-16. Because commercial fishing is not an exemption in the WPA, and because the activity at issue fell within MassDEP’s definition of the term “dredge,” (*i.e.*, it was “a slight temporary deepening of the ocean floor”) these commercial fishers continue to face local control over the use of DMF-permitted hydraulic dredge fishing gear in Provincetown waters. *See, id.* at 716.⁸

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

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

Status of Recent Filing of a Notice of Intent

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

Concerns Moving Forward

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

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

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

This in turn could set a precedent requiring commercial fishers to file a NOI and obtain an Order of Conditions from all municipalities where they intend to deploy hydraulic dredge fishing gear within wetland resource areas, even if the municipality does not actively apply its WPA authority to the use of this gear. This would effectively return the fishery back to the balkanized management program the legislature sought to end when it amended G.L. c. 130, §52 in 1982. In sum, this would create a costly¹⁰ and onerous barrier for commercial fishers to prosecute a fishery they are permitted by DMF to participate in. This may constrain fishing effort in many areas resulting in substantial adverse negative economic impacts on the state's commercial surf clam and ocean quahog fishery. Additionally, it would create a substantial administrative burden on those state and local government bodies involved in the administration of the WPA, including MassDEP and local ConComs.

To date, WPA case law has focused on the management of hydraulic dredge fishing gear. However, it is conceivable that a local ConCom could expand upon existing precedent and apply its WPA authority to other bottom-tending fishing gears. MassDEP Wetlands Protection Act Regulations¹¹ and Water Quality Certification Regulations¹² broadly define the term dredging, and in the broadest reading, dredging could refer to any activity that temporarily deepens or widens a furrow or repositions sediment. Therefore, the potential exists for the WPA to apply to many other non-hydraulic bottom-tending fishing gears. Foremost, this includes other fishing gears that have been colloquially given the name “dredge.” These gears scour the sea floor to collect shellfish and invertebrate species and impact the top layer of sediment and result in sediment repositioning and suspension. These gears encompass both “dry” dredges and “drags”. Dry dredges use teeth or a blade to penetrate the sediment and extract target shellfish species (e.g., bay quahog dredge), whereas drags are pulled across the sea floor to capture those shellfish and invertebrates that reside above the sediment (e.g., sea scallop dredge, bay scallop dredge, oyster dredge, sea urchin dredge). While drags have less of an impact on the sea floor than penetrating dredge gear, they create sediment repositioning and suspension making them potentially vulnerable to WPA regulation.

Conclusions and Potential Solutions

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

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

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

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

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

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

It is my view that a solution cannot be achieved through policy or regulation, particularly as MassDEP cannot create a regulatory exemption in the absence of a statutory exemption. Therefore, a statutory exemption is warranted. This can be accomplished through two mechanisms. The WPA could be amended to exempt the lawful use of DMF-permitted fishing gears—the WPA already exempts certain activities from its oversight including mosquito control, cranberry bog flooding and drainage, and other agricultural and aquacultural uses¹³. Alternatively, DMF’s enabling statute at G.L. c. 130, § 1A, could be amended to expressly state in that DMF has the sole and exclusive authority to regulate the harvest of marine fish and the effect of such activity on marine fish species and marine fisheries resources, and that fishers engaged in such DMF-permitted activities are not required to file a notice of intent, obtain a Chapter 91 license, or obtain a water quality certification. In my opinion, the latter fix may be the ideal resolution.

Modernizing DMF’s Management Plan

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

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

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

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