

**NOTICE OF AGENCY RULE-MAKING ADOPTION**

**AGENCY:** Department of Marine Resources

**CHAPTER NUMBER AND TITLE:** Chapter 14 – Oysters

**ADOPTED RULE NUMBER:**  
(LEAVE BLANK-ASSIGNED BY SECRETARY OF STATE)

**CONCISE SUMMARY:** This rule creates a minimum size (2.5 inches) for American oysters, with a 10% tolerance. An exception is provided for aquaculturists who take or possess undersize oysters from their lease or license sites. The rule also establishes a 10% tolerance for European oysters, which already have a minimum size of 3 inches.

**EFFECTIVE DATE:**  
(LEAVE BLANK-ASSIGNED BY SECRETARY OF STATE)

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*Please approve bottom portion of this form and assign appropriate MFASIS number.*

APPROVED FOR PAYMENT _____					DATE: _____	
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<i>Please forward invoice to: Natural Resource Service Center, 155 SHS, Augusta</i>						
010	13A	1120	10	4946	regulations	

DEPARTMENT OF MARINE RESOURCES - SHELLFISH HARVESTING

CHAPTER 14 -OYSTERS

TITLE INDEX

- 14.01 Definition
- 14.10 European Oyster Harvesting Restrictions: ~~Closed Season~~
- 14.30 American Oyster Harvesting Restrictions
- 14.40 Criteria for Issuing a Cultchless American Oyster License

## DEPARTMENT OF MARINE RESOURCES

### Chapter 14 - Oyster Regulations

#### 14.01 Definitions

- A. "European oyster" means animals of the species *Ostrea edulis*.
- B. "American oyster" means animals of the species *Crassostrea virginica*.

#### 14.10 European Oyster Harvesting Restrictions

##### A. Closed Season

It shall be unlawful to take, possess, ship, transport, buy or sell European oysters from June 15 to September 15 of any year.

##### 1. Exceptions

Persons holding an aquaculture lease issued pursuant to 12 M.R.S.A. §6072, §6072-A or §6072-B, as provided in §6073-A, and persons holding a limited-purpose aquaculture (LPA) license pursuant to 12 M.R.S.A. §6072-C, may harvest European oysters from an aquaculture site from June 15 to September 15 of any year. Transportation, buying or selling must be done in accordance with Chapters ~~9 and 15-20 and 21-24~~ and 94.

A person shall not be in violation of Chapter 14.10(A) if they are in possession of a bill of lading for the amount of European oysters purchased from June 15 to September 15 of any year showing those oysters were lawfully obtained from an origin outside the State of Maine and possess any applicable license and permit in accordance with Chapter 24.

##### B. Minimum size

It shall be unlawful to take, possess, ship, transport, buy or sell European oysters whose shells are less than 3 inches in the longest diameter.

##### 1. Tolerance

Any person may possess European oysters that are less than 3 inches if they comprise less than 10% of any bulk pile. The tolerance is determined by numerical count of not less than one peck nor more than 4 pecks taken at random from various parts of the bulk pile or by a count of the entire pile if it contains less than one peck.

##### ~~4-~~ 2. Exceptions

European oysters of smaller size may be taken or possessed by persons holding an aquaculture lease issued pursuant to 12 M.R.S.A. §6072, §6072-A, or §6072-B, as provided by §6073-A, or persons holding a limited-purpose aquaculture (LPA) license issued pursuant to 12 M.R.S.A. §6072-C. Transportation, buying or selling and sanitation requirements must be done in accordance with Chapters ~~9 and 15-20 and 21-24~~ and 94. This exception shall only apply to European oysters cultivated in the leased or licensed areas.

##### C. Compliance

Persons must comply with Chapters 9, 24 and 94. ~~DMR regulations in Chapters 9 and 15 through 20 established in accordance with the National Shellfish Sanitation Program Model Ordinance (NSSP/MO) for the sanitary control of shellfish, which includes tagging requirements, and with DMR regulations in Chapters 21-24.~~

### 14.30 American Oyster Harvesting Restrictions

#### A. Minimum Size

It shall be unlawful to take, possess, ship, transport, buy or sell American oysters whose shells are less than 2.5 inches in the longest diameter.

##### 1. Tolerance

Any person may possess American oysters that are less than 2.5 inches if they comprise less than 10% of any bulk pile. The tolerance is determined by numerical count of not less than one peck nor more than 4 pecks taken at random from various parts of the bulk pile or by a count of the entire pile if it contains less than one peck.

##### 2. Exception

American oysters of smaller size may be taken or possessed by persons holding an aquaculture lease issued pursuant to 12 MRS §6072, §6072-A, or §6072-B, as provided by §6073-A or persons holding a limited purpose aquaculture (LPA) license issued pursuant to 12 MRS §6072-C. Transportation, buying or selling and sanitation requirements must be done in accordance with Chapters 24 and 94. This exception shall only apply to American oysters cultivated in the leased or licensed areas.

**Basis Statement:**

This rule creates a minimum size (2.5 inches) for American oysters, with a 10% tolerance. An exception is provided for aquaculturists who take or possess undersize oysters from their lease or license sites. The rule also establishes a 10% tolerance for European oysters, which already have a minimum size of 3 inches.

**Summary of Comments:**

Notice of this proposed rulemaking appeared on June 6, 2018 in the five major daily newspapers as published by the Secretary of State. On June 7, 2018, the rule was posted on the DMR website, and electronic messages were sent to individuals and other stakeholders who subscribe to DMR notices. Public hearings were advertised in compliance with the procedures outlined in the Maine Administrative Procedures Act and were held on June 25, 2018 at 2pm in the DMR conference room, Augusta. The comment period closed on July 6, 2018.

Attendees at June 25, 2018 hearing

Name	Affiliation
Bailey Bowden	Penobscot
Kathleen Billings	Stonington
Judy Rolfe	Addison
Deirdre Gilbert, Kohl Kanwit, Denis-Marc Nault, and Amanda Ellis	DMR Staff

**Public Hearing Comments:**

**Bailey Bowden, Town of Penobscot Shellfish Conservation Committee:**

My name is Bailey Bowden and I am the Chair of the Town of Penobscot Shellfish Conservation Committee. I would like to address you in that capacity, but with the short notice given by DMR for this hearing we were not able to have a meeting to discuss this matter. Our meeting will be tomorrow night and I suspect that written comment will be sent. I strongly oppose adding size limits for European and American oysters as suggested in Chapter 9. We on the Bagaduce River consider oysters to be a non-native and invasive species. We have found no facts that would lead us to believe that oysters ever occurred here naturally. We would prefer that aquaculturists raise triploids - or sterile oysters to prevent their spread. The Shellfish Committee destroys all oysters on sight in an effort to keep these creatures from spreading. Maine DMR may have the right to lease the ocean waters to an individual to raise oysters but have no right to force the expansion of oysters onto the intertidal which are the private property of the riparian owners. What's next...will DMR be planting arctic surf clams everywhere or the geoduck?

**Kathleen Billings, Stonington**

*The following comment was read into the record during the Chapter 7 hearing. It was not read into the record at the Chapter 14 hearing. However, because it pertains to Chapter 14 it is included below.*

My name is Kathleen Billings, I am the Town Manager of Stonington Maine and I am deeply concerned about the lack of transparency and this process of rule-making now. It used to be any proposals went to each respective advisory council. I have been watching the agendas and attended the last SHAC meeting. In no way did this present proposal on Chapter 7 and Chapter 14 come up before the SHAC for public dialog and comments. Why? What happened to the DMR? It used to be at least more open and responsive! This is not right! I want to know who is proposing these rule changes and why! These are clearing changing the intent of municipal shellfish programs, not language clean up. It is taking away the partnership of the towns with the DMR and the authority to management our town flats as we see necessary, and what we put our hard-earned tax dollars and fees into. Think of the thousands of clam

licenses, the fees for enforcement, the jobs the shellfish program provides. These are job killing rules and the high hierarchy of the DMR is misguiding the industry with the lack of transparency and now proposing job killing rules to break the spirit of the diggers, towns and tax payers who thrive on this grass roots managed fishery for our local economy. I am appalled at this process being rolled out, the loss of our intertidal zone rights, lack of transparency in rule making and the loss of confidence I have now with the DMR in regards to the resources. The claim of no fiscal impacts is not true. Telling towns how much enforcement hours or MCJA requirements they need to do is fiscal impact. Taking away management tools of size management is taking away the ability for towns to management the resource in 7.20B is counterproductive. What is the shellfish management tool or plan going ahead for the DMR to management the resource? We need to see the plan going forward if you are boldly proposing these regulation changes! Making towns do surveys, having the ability to pull programs from towns if they can't in 7.30-2 being proposed, and an economic hardship for towns with the 10% requirement. If you impose these gross regulations and towns have to surrender their co management programs, who is the DMR going to do surveys. Is this like the State-owned flats you have now, where is your plan for these counterproductive proposals. The unresolved MDOL issue with labor on conservation requirements is still not clear. On 7.40 1 & 2 language proposed is not clear on the rates, and who and what makes up a qualified non- resident. It appears to be something other than what the towns are able to do as being proposed by the poorly written and confusing language. For section 7.50 A & B are unclear and impose huge fiscal impacts to the town for increasing hours for enforcement. We can't always go to a town meeting so fast to re-budget for this. What is the matter with you folks, after working with the towns for 60 years, where is your thinking. We have an annual budget once a year, being forced to a special town meeting takes time and money! As for section 7.30 I am against mussel dragging on town flats, it kills our fishery and with our fees going to mussel survey's I don't agree with that also. The mussel industry died because the DMR didn't manage it right, now you want survey's but do mussel dragging without consulting the towns who are working on keeping productive flats productive is wrong and stripping more of our authority. Clearly, the DMR needs to rethink these rules, change the intertidal rules just passed on new "definitions" of intertidal ownership and enforcement back to what they were. Same thing, unclear enforcement issues are a fiscal impact to us, a huge one! These proposed regulations should not pass this process. Who and what towns were reached out to for these regulations changes? I am respectfully asking for in this letter for a FOAA request for the last year of Kohl Kanwit's emails pertaining to Chapter 7 rules. I am opposed to it, I know other towns are and my Selectmen are opposed to them.

### **Written Comments**

Comment period ended July 6, 2018

#### **Stonington Board of Selectman, submitted via email, July 3, 2018**

It has come to our attention regulation changes are being proposed for Chapter 7 and Chapter 9 of the shellfish management program. We are opposed to changes to the program as outlined in this letter. It appears from the various sections towns participating in this program are losing their ability to manage our resources. As proposed these draft regulations were never brought for or reviewed by the SHAC council before heading to rule-making except for a brief conversation about taking undersize oysters and moving them into private leases. Two SHAC meetings went by with no actual rulemaking draft in its entirety was presented for dialog and comment as changes to 6671 & other sections. This is top down management, no co-management as it should be for intertidal resources. If this was lobster, this would never happen, but it appears internally DMR or a few in other towns can propose changes that can have drastic effects on other town programs. Also, it states there is no fiscal impact. Not true for several of these sections of changes being proposed such as - Section 7.30-2, for survey work, we don't have the capacity for doing the required amount of flats if you choose to make us do it. If some programs have to

have wardens with MCJA (over and above the DMR current warden requirements now) certifications, or go to 20 hours, in 7.50- 28 it is a fiscal impact. A huge one for some of us if current wardens cannot patrol due to the proposed requirements for relay of seed in closed or restricted areas. One of the reasons we were granting these resource management rights was because the DMR or Sea and Shore back then did not have the money or resources to be able to do it. You still don't or if you do, present the plan going forward to fulfil the draft rulemaking proposal as it stands now. On 7.20 B- changing the size requirements we object to. It takes away a management tool for us to get another year class if we choose to go to a larger size. On 7.70-2, we object to the towns not being able to comment on mussel harvesting on flats that you are crossing us off the list on. Why? It takes away our rights to be able to have a say whether good productive flats get dragged up damaging the clam resources we have. We went through this with our reciprocal ordinance with Deer Isle, mussels would come into Pickering & Greenlaw coves and drag and kill good productive flats. There are no mussels in this area and many others because the mussels either have died off, were over harvested or so much seed was already over dragged off the coves the resource collapsed as well as other species until almost at times it is too late.

Chapter 9, with the oyster's changes being proposed. There should be more dialog with all the towns. As it is written currently it appears it can easier to have the wild clam fishery taken over by oyster farming or seeding it over to over take soft shell clams. With LD 15 I 9 and the intertidal zone definition changes will make it impossible to define at any given time who can harvest what with the tide changes and is causing enforcement problems that some Shellfish Wardens and Towns will be dealing with.

It has come to our attention as well, that very few if any clam committees were informed or shown the proposed rule making changes before June 6 release of this to go to hearing. Even in the Chapter 7 changes, on the Rule Making Fact Sheet under Relevant Infonnation only staff and Bureau of Public Health only had input into this. None from Patrol, none from Town Programs or SHAC. This is wrong and is a bad way to go not to inform the industry of these many critical changes.

Another item we have become aware of in trying to collect information on how many towns participate, how much town budgets contribute to the health and sustainability of the municipal clam programs or how many enforcement hours are done, you can't answer these questions because you do not compile any total summary for the public to review. What does our license fees go for now? This should be a tool for those in the industry and the Towns, to be able to have access to and use going forward. You used to do it, but now for almost 15 years nobody does anything although it is a requirement or our programs are pulled if we don't turn it in. This is a problem and we strongly suggest since Deer Isle and Stonington is a huge area of clam resources and license and jobs we depend on.

### **Judy Rolfe, Town of Addison Shellfish Committee, submitted via email, July 6, 2018**

The Town of Addison, Maine would like to comment on the proposed changes to Chapters 7 and 14 of DMR Rule.

Chapter 14

- 14.10 B 1 sets a size limit on European oysters
- 14.30 A sets a size limit on American oysters

This rule forces municipalities to allow organisms introduced into the local ecosystem by aquaculture interests to settle, grow, and displace native species within the ecosystem. The State of Maine has the authority to lease the ocean to individuals, but, allowing aquaculture by-products to spoil our pristine flats with an invasive species is going too far. With the Educational Permits that have been issued within the Intertidal Zone and with this is the placement of not Native to the Area species we would have no control to remove. It is noticeable that in most paragraphs that have been changed, words and phrases like "Municipality", "Municipal Shellfish Conservation Ordinance", and "Shellfish Management Plan" have been minimized by removing the capitalizing of the words. This is a subtle attack on the co-management

regime that has existed amicably for over 50 years. The lack of respect for the municipality by the Department has been noticed.

**We as the Town of Addison Shellfish Committee Oppose any of these changes being done. The complete disregard for the voices of Municipal Shellfish Harvesters that these Rules affect. The very vague summary of these proposed rule changes giving people the illusion that this is only about clarifying wording from business days to days is misleading and dishonest. Many committees have seen the summary and don't read any further thinking it is just about what is in the summary as was evident by the attendance at the Public Hearing and my talking with Committees after the Hearing. Any Proposed Rule Changes should go through SHAC and allow more than 17 days for committees to talk with their members. Any changes affect the Harvesters and Municipalities. Our Ordinance changes are gone over and over with DMR before they can be approved. Show the Municipalities the same consideration. Each Municipality is different throughout the State just as each State Agency is different.**

**James Saltonstall, riparian landowner on the Bagaduce River, submitted via email, July 6, 2018**

*The comment was also signed by the following: Tom and Karen Adamo, Bundy Boit, Peter and Lucia Gill Case, John and Joan Freeman, Nancy Gill, Ruth Modisette, Caren Plank, Ann Sterling, Andrew Abrams, Tom Stewart and Trina Dykstra.*

Regarding the proposal to impose a minimum size for oysters, both European and American, included in Chapter 14;

1. The Bagaduce River is tidal off of our property; we have intertidal lands. These lands are private property down to mean low water. They are not owned by the State, nor can the State “take” our property for the use of intertidal aquaculture. Chapter 2, 2.90.2D. 3b states: “Riparian landowner. For license sites located above the mean low-water mark, the signature of the riparian landowner, which shall verify that the landowner consents to the licensed activity being conducted on the intertidal land, is required.
2. The DMR has acknowledged that this intertidal property belongs to the property owner, not the State. Taken from DMR application for Limited Purpose Aquaculture lease (LPA) #4: “4. Intertidal Sites: For LPA sites above the extreme low water mark (XLW) in towns with a municipal shellfish management ordinance approved by DMR, the chairperson of the municipal shellfish committee is required to sign the LPA application form to verify that the LPA will not unreasonably interfere with the activities of the shellfish program. For LPA sites above the mean low water mark (MLW), the signature of the riparian landowner of the adjacent upland is required on the application to verify that the landowner consents to the LPA activity being conducted on the owner’s intertidal land.”
3. These regulations provide no oversight for the property owner against illegal or inappropriate use.
4. These new Regulations allow oyster seeding on intertidal beds currently used by local clammers for their existing fishery. This existing clamming fishery has been consistent with historical use and has proven a beneficial and appropriate use of this intertidal land.
5. Where does this process of “taking” people’s land end? If you feel you can allow oyster bed seeding this year on land that is currently used by local clammers and fishermen, what will you allow next year and the year after? Why give priority to oysters over clams when there is an existing clam fishery?
6. We have not seen any historical evidence that oysters have naturally occurred in the Bagaduce River and are worried that the introduction of a new species (oysters in this case) may bring new invasive



elements into the River and spoil existing shoreland flats used by local fishermen. We are already dealing with the invasion of green crabs. What will come next?

7. The Legislature granted the municipality the power to manage oysters through the local Municipal Conservation Ordinance. This proposed change in regulations allows oyster seeding within the intertidal zone without the approval of local municipalities.

8. We are distressed that there is nothing in these regulations for the local towns and municipalities, or indeed for the State. We cannot understand why the State does not require lease holders to pay some “tax” on their use of the land and water. Property owners do, businesses do, and aquaculture is a business. Similarly, we cannot understand why municipalities are not allowed to impose a “fee” for the use of their land and water resources.

A General Comment: The tone and language used in these proposals does nothing to encourage a supportive co-management relationship between the municipality and DMR. This approach leaves the impression DMR does not trust the municipalities to set and oversee its own regulations. We are worried that local control is completely left out of these proposed changes to the regulations. Home rule is what most towns want. We know best what will work best in our towns. What do you do to make sure that there is some input by varied communities in these regulations?

#### **Department Response to Comments:**

**Note:** During the rule-making process the Department also proposed changes to Chapter 7, which pertains to requirements for municipalities with shellfish conservation programs. Some commenters included Chapter 7 comments with Chapter 14. Comments specific to Chapter 7 are addressed in rule-making documents associated with that filing. In addition, some commenters mistakenly referenced Chapter 9 instead of Chapter 14. Any references to Chapter 9 are included in this filing. Please reference the Chapter 7 rule-making adoption filing for the Department’s response to comments that were specific to that proposal.

#### **Transparency of Rule-Making Process:**

Some commenters felt that the rule-making process was not transparent. This rule was promulgated in accordance with applicable portions of the Maine Administrative Procedure Act (MAPA) 5 M.R.S. § 8001-11008. MAPA establishes a uniform, comprehensive set of procedures governing the administrative actions of state agencies, including rule-making. This includes publishing notice of the proposed rule and providing an opportunity for feedback via a comment period and public hearing. In this instance, notice of the rule-making proposal was published on June 6, 2018, in the five major newspapers and the Secretary of State’s notice of rulemaking column. On June 7, 2018, the Department also posted the proposed rule to its website and sent electronic notice to industry and other stakeholders via email listserv. A public hearing was held on June 25, 2018, and the comment period closed on July 6, 2018. The rulemaking process is an appropriate procedure by which to obtain public input from stakeholders. This rule change was proposed by the Shellfish Advisory Council.

#### **Intent of the Proposed Rule:**

Some commenters reference several issues that are not germane to the proposal under consideration (i.e. intertidal property rights, invasive species, etc.). Pursuant to 12 M.R.S.A. § 6171 the Department is vested with the authority to establish minimum sizes of marine organisms. Given this authority, the proposal creates a minimum size (2.5 inches) for American oysters, with a 10% tolerance. The proposed rule also establishes a 10% tolerance for European oysters, which already have a minimum size of 3 inches. This proposal is supported by the Shellfish Advisory Council, who voted unanimously, in fall 2017, to establish a minimum size of 2.5 inches for wild American oysters, with a 10% tolerance. The

intent of this regulation is to minimize undersize product from being brought to market and provide opportunity for individuals who wish to harvest wild product that is not on aquaculture lease or license sites.

**Concerns with the Concise Summary:**

The intent of the concise summary is to convey a brief overview of the proposed changes. The Department provided an accurate concise summary noting that the proposed changes would establish a minimum size (2.5 inches) for American oysters, with a 10% tolerance; and would establish a 10% tolerance for European oysters, which already have a minimum size of 3 inches. The concise summary is followed by the text of the existing rule with proposed changes noted by a ~~striethrough~~ or underline. Any text containing a ~~striethrough~~ would be removed from the regulation, while any underlined text would be added to the regulation. Existing text that does not have a ~~striethrough~~ or underline remains unchanged. While individuals may choose to only consult the concise summary, the rule-making packet contains all changes.

**Tone and Language of the Proposed Rule:**

One commenter was concerned that the tone and language of the rule did not foster co-management. The intent of a regulation is to convey applicable laws, not emotion or attitude. Regulations are constructed to be clear, concise, and understandable.

## Rule-Making Fact Sheet

(5 M.R.S., §8057-A)

AGENCY: Department of Marine Resources

NAME, ADDRESS, PHONE NUMBER OF AGENCY CONTACT PERSON:

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CHAPTER NUMBER AND RULE: Chapter 14

STATUTORY AUTHORITY: 12 MRS §6171

DATE AND PLACE OF PUBLIC HEARING:

June 25, 2018 2:00 PM DMR Offices, Marquardt Building, 32 Blossom Lane, Augusta, Maine

COMMENT DEADLINE: July 6, 2018

PRINCIPAL REASON(S) OR PURPOSE FOR PROPOSING THIS RULE: [see §8057-A(1)(A)&(C)]

At their meeting in the fall of 2017, the Shellfish Advisory Council voted unanimously to recommend to the Department to go to rule-making to establish a minimum size of 2.5 inches for wild American oysters, with a 10% tolerance. This will minimize undersize product from being brought to market and provide opportunity for individuals who wish to harvest wild product that is not on lease or license sites.

IS MATERIAL INCORPORATED BY REFERENCE IN THE RULE? \_\_\_ YES \_\_\_ X NO [§8056(1)(B)]

ANALYSIS AND EXPECTED OPERATION OF THE RULE: [see §8057-A(1)(B)&(D)]

Marine Patrol will enforce the new minimum size as they enforce other minimum sizes for shellfish.

BRIEF SUMMARY OF RELEVANT INFORMATION CONSIDERED DURING DEVELOPMENT OF THE RULE (including up to 3 primary sources relied upon) [see §§8057-A(1)(E) & 8063-B]

The Shellfish Advisory Council and Marine Patrol were consulted in the development of the rule.

ESTIMATED FISCAL IMPACT OF THE RULE: [see §8057-A(1)(C)]

No fiscal impact is anticipated.

***FOR EXISTING RULES WITH FISCAL IMPACT OF \$1 MILLION OR MORE, ALSO INCLUDE:***

*ECONOMIC IMPACT, WHETHER OR NOT QUANTIFIABLE IN MONETARY TERMS:*

[see §8057-A(2)(A)]

*INDIVIDUALS, MAJOR INTEREST GROUPS AND TYPES OF BUSINESSES AFFECTED AND HOW THEY WILL BE AFFECTED:* [see §8057-A(2)(B)]

*BENEFITS OF THE RULE:* [see §8057-A(2)(C)]