



Charlie Baker
Governor

Karyn E. Polito
Lieutenant Governor

Commonwealth of Massachusetts

Department of Fish and Game

251 Causeway Street, Suite 400
Boston, Massachusetts 02114

(617) 626-1500
Fax (617) 626-1505



Kathleen A. Theoharides
Secretary

Ronald S. Amidon
Commissioner

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Geoff Gordon
North and South Rivers Watershed Association
P.O. Box 43
Norwell, MA 02061

Dear Geoff,

At the September 1st meeting, I pledged to you to look further into the matters concerning the closure of shellfish beds adjacent to the Scituate waste water treatment plant outfall. Issues that warranted further investigation were: 1) an examination of the legal requirements the Division of Marine Fisheries (DMF) has to follow - or not - the so-called National Shellfish Sanitation Program (NSSP) Model Ordinance (MO) created by the Interstate Shellfish Sanitation Conference and the federal Food and Drug Administration; and 2) consequences (intended and non-intended) of not following the MO and thereby allowing areas to be classified with less stringent standards in certain cases where only recreational shellfishing (no commercial shellfishing) occurs.

Legal Requirements: State law and regulations require that DMF follow the MO when classifying shellfish growing areas. (Note that DMF's authority is derived from Chapter 130 and DMF is bound to follow these state laws. These laws are enacted by the legislature and then signed by the governor. Regulations, while enacted by DMF, may complement state law but cannot be contrary to state law.) The authorities governing these activities are Massachusetts General Laws (MGL) c. 130 sec. 74 and Code of Massachusetts Regulations (CMR) 322 CMR 16.00.

Massachusetts General Laws c. 130 sec. 74 requires DMF to examine coastal waters and flats to "determine what areas thereof are so contaminated that shellfish obtained therefrom are unfit for food and dangerous to the public health." This section further authorizes DMF, jointly with the Department of Public Health, and after consultation with the Department of Environmental Protection, to establish "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.**" (emphasis added). This state statute does not distinguish between commercial and recreational fishing.

DMF followed the statute's directive in its regulations at 322 CMR 16.00 and confirmed DMF's participation in the NSSP, an FDA/state partnership (as further described below). 322 CMR 16.01 states, "[DMF] manages its shellfish resources and commercial shellfish fisheries in strict conformity with the NSSP's MO. [DMF] 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 . . . 322 CMR 16.00 also serves to safeguard public health, maintains consumer confidence and promotes the state's shellfish fisheries."

The regulations at 322 CMR 16.03(1) further confirm that DMF follows the MO in classifying approximately 1.7 million acres of overlying waters under the jurisdiction of the Commonwealth to "determine if these areas meet the sanitary conditions necessary to allow the harvest of shellfish for human consumption" by requiring DMF classify such areas "based on the

results of the sanitary survey and as required by the Model Ordinance.” Like MGL c. 130 sec. 74, the regulation applies to both recreational and commercial shellfishing.

Consequences of an alternative strategy to classify recreational areas at less stringent standards than commercially harvested areas: While the laws and regulations discussed above do not allow DMF to pursue the approach you have requested at this time, the consequences of such changes could be challenging.

- If DMF chose to deviate from the Model Ordinance there is the likely outcome that all of Massachusetts shellfish could be embargoed by FDA if found in non-compliance with the MO.
- If somehow DMF could convince FDA that areas not harvested commercially should be classified with lower water quality standards, the net result would be a bifurcated system of classification that DMF would have to oversee. Development of alternative water quality standards would likely be a lengthy and difficult process, and veer from proven public health tenets. This would also increase the workload for DMF’s biologists and bacteriologists who sample and test the waters because more testing would be required to accommodate the second set of standards.
- The municipality that oversees these fisheries would be mandated to increase patrols and oversight to ensure compliance. Many communities have less than a full-time constable. That would not be adequate for sufficient patrolling and enforcement.
- DMF would be hard-pressed to respond to criticisms from DPH and consumer advocates for being less protective of consumers of recreationally harvested shellfish than consumers of commercially harvested shellfish.
- It should also be noted that none of the 23 shellfish-producing states have separate classification systems for commercial and recreational fisheries. One state – Mississippi – looked into this approach many years ago and concluded such a system would be too difficult to develop and manage, as well as likely too expensive.

What are the next steps? At this time, DMF intends to continue with the current approach, which means that the closure will remain in place. However, DMF has been and will continue to work on delineating the closure area more precisely. Drawing closure delineation lines is a calculation based on estimates of dilution rates as effluent dissipates in waters adjacent to the outfall. DMF intends to work with WWTP operators to evaluate plant performance and determine the extent and impact of an untreated or partially treated effluent release. DMF believes hydrodynamic modeling studies to be completed by SMAST/UMass Dartmouth researchers will provide the most timely and accurate depiction of dilution which they expect will result in a more precise (and hopefully smaller) area that will need to remain closed around the outfall. The need to create and verify dilution analyses around wastewater treatment plants is not limited to the Scituate facility but extends to all plants which impact shellfish growing areas. DMF’s contract with SMAST is to conduct a dilution analysis for these treatment plants coastwide, prioritizing the Scituate plant.

This work is set to begin this month. DMF anticipates this work will allow DMF to determine definitively whether or not reopening the area is warranted and whether DMF will be able to advocate with FDA regarding the dilution analysis and the closure area boundary. DMF expects preliminary data this winter in 2022.

Sincerely,



Ronald S. Amidon
Commissioner