

## Notice of Agency Rule-making Proposal

AGENCY: 13-188-Department of Marine Resources

CHAPTER NUMBER AND TITLE: Chapter 115 *Vibrio parahaemolyticus* Control Plan

TYPE OF RULE (*check one*):         Routine Technical         Major Substantive

PROPOSED RULE NUMBER (*leave blank; to be assigned by Secretary of State*):

BRIEF SUMMARY: This proposed regulation would add specified areas of the Scarborough and Nonesuch Rivers and Spinney Creek to existing vibrio control areas. It would change the dates the control plan is in effect in all designated control areas from May 1<sup>st</sup> through October 31<sup>st</sup> to June 1<sup>st</sup> through October 15<sup>th</sup>. It would change the submission deadline for control plans from March 1<sup>st</sup> to April 1<sup>st</sup>. The proposed rule also modifies what information harvesters and dealers must include in their control plans. It also permits recreational harvest in designated control areas provided the town has a municipal shellfish ordinance that issues recreational licenses, and the municipality provides vibrio education to recreational harvesters prior to the issuance of the recreational license.

Date, time and location of PUBLIC HEARING (*if any*): None scheduled

COMMENT DEADLINE: February 12, 2021

CONTACT PERSON FOR THIS FILING (*include name, mailing address, telephone, fax, TTY, e-mail*):

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CONTACT PERSON FOR SMALL BUSINESS IMPACT STATEMENT (*if different*): Same

FINANCIAL IMPACT ON MUNICIPALITIES OR COUNTIES (*if any*): None

STATUTORY AUTHORITY FOR THIS RULE: 12 M.R.S. §6171-A

SUBSTANTIVE STATE OR FEDERAL LAW BEING IMPLEMENTED (*if different*): Same

AGENCY WEBSITE: <http://www.maine.gov/dmr/rulemaking/>

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\* Check one of the following two boxes.

X The summary provided above is for publication in both the newspaper and website notices.

The summary provided above is for the newspaper notice only. Title 5 §8053, sub-§5 & sub-§7, ¶D. A more detailed summary is attached for inclusion in the rule-making notice posted on the Secretary of State's website. Title 5 §8053, sub-§3, ¶D & sub-§6.

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DEPARTMENT OF MARINE RESOURCES

Chapter 115 - *Vibrio parahaemolyticus* Control Plan

DEPARTMENT OF MARINE RESOURCES

CHAPTER 115

*Vibrio parahaemolyticus* CONTROL PLAN

TITLE INDEX

115.01 Compliance

115.02 Control Months and ~~Locations~~ Designated Control Areas

115.03 Definitions

115.04 General Requirements

115.05 Harvest Restrictions During Control Months

115.06 Additional Harvest Restrictions During Control Months For 80° F and above Air Temperatures

115.07 Noncompliance

115.08 Reporting of Violations

~~115.09 Effective Date~~

### 115.01 Compliance

The *Vibrio parahaemolyticus* Control Plan (the “Vibrio Control Plan” or the “Control Plan”) applies specifically to American and European ~~Oysters~~ oysters (*Crassostrea virginica* and *Ostrea edulis*) and ~~Hard Clams~~ hard clams (*Mercenaria mercenaria*) harvested from ~~the Damariscotta River, the Sheepscot River, and the New Meadows River~~ designated control areas. The Control Plan provides additional and more rigorous controls than those imposed by DMR Rules ~~Chapters~~ chapters 9, 22 and 94 to the handling of American and European ~~Oysters~~ oysters and ~~Hard Clams~~ hard clams in the area described in Section 115.02. Insofar as the Control Plan time and temperature requirements exceed those imposed by existing rules or are in addition to those imposed by existing rules, the relevant provisions of the Control Plan shall supersede the provisions of ~~Chapters 9 and 22~~ chapters 9, 22 and 94.

The Control Plan shall be complied with during the harvesting and handling of the above-described species, as conducted by harvesters, certified shellstock dealers, certified shellfish establishments (sometimes referred to as shellfish facilities or plants), shucker-packers, shellstock shippers and receivers, reshippers, depuration processors, enhanced retail seafood license holders and all others involved in the processes described in ~~Chapters 9 and 22~~ chapters 9, 22, and 94.

### 115.02 Control Months and ~~Locations~~ Designated Control Areas

The Vibrio Control Plan is in effect from ~~May 1<sup>st</sup> through October 31<sup>st</sup>~~ June 1<sup>st</sup> through October 15<sup>th</sup>, inclusive, in the designated control areas:

- A. all parts of the Damariscotta River north of a line beginning at Montgomery Point, Boothbay and running southeast to Jones Point, South Bristol, ~~in~~
- B. all parts of the Sheepscot River north of Route 1, ~~and in~~
- C. all parts of the New Meadows River north of Bath/State Rd in Brunswick and West Bath.
- D. all parts of the Scarborough and Nonesuch Rivers north of a line beginning at the eastern tip of Pine Point Beach, Scarborough and running east to the opposite shore on Prouts Neck, Scarborough
- E. all parts of Spinney Creek north of Route 103

A mandatory harvest/purchase plan must be submitted annually by ~~March~~ April 1<sup>st</sup> in accordance with section 115.04 (F).

### 115.03 Definitions

**“Adequately iced”** means that the amount and application of ice is sufficient to ensure that immediate cooling begins and continues for all shellstock in a container. If ice slurry is used and the shellstock are submerged, the presence of ice in the slurry indicates adequate icing. Potable water must be used for the production of ice used for cooling of shellstock.

**“Control months”** means ~~May~~ June 1<sup>st</sup> through October 31<sup>st</sup> October 15<sup>th</sup>, inclusive

**“Harvest”** means the act of removing shellstock from growing area waters and its placement on or in a manmade conveyance or other means of transport or transfer. This does not include the placement of shellstock in aquaculture gear designed to grow or enhance shellstock as part of husbandry practices.

~~“Husbandry” means the production, development, or improvement of a marine organism.~~

“**Mechanical Refrigeration**” means storage in a container or conveyance that is approved by the Maine Department of Marine Resources (DMR) and capable of cooling to, and maintaining, an ambient temperature of 45°F or less.

“**Potable water**” means a water supply which meets the requirements of the Safe Drinking Water Act, as administered by the EPA and which meets the requirements of DMR Chapters 15-20.

“**Resubmerge**” means, and is strictly limited to, reintroduction of ~~shell stock~~ shellstock into approved waters following the removal of shellstock from approved waters. This is separate and distinct from “wet storage” which is a certified dealer activity. Resubmergence shall be conducted only by an aquaculture lease holder or permit holder.

“**Shading**” means to shelter by intercepting the direct rays of the sun to protect the shellstock from heat. Shading may be accomplished by any means that effectively protects the harvested shellstock from direct sunlight and prevents excessive heat build-up in the shaded area. Materials used for shading should not be in direct contact with the shellstock unless they are food grade surfaces (e.g. no seaweed or wet tarps applied directly to shellstock).

“**Temperature control**” means the use of ice or mechanical refrigeration, which is capable of lowering the temperature of the shellstock and maintaining it at an internal temperature of 50°F or less.

“**Time of harvest**” for the purpose of temperature control time of harvest begins once the first shellstock is no longer submerged. For example, the time intertidal shellstock are first exposed to the air as the tide recedes or the time when a drag is brought onboard a vessel with shellstock from a subtidal resource.

“**Vp**” and “**Vibrio**” refer to *Vibrio parahaemolyticus*

#### 115.04 General Requirements

- A. Deterioration and Decomposition. Harvesters shall not allow shellstock to deteriorate or decompose from exposure to high ambient air temperatures and shall deliver shellstock to a certified shellfish dealer before such deterioration or decomposition occurs.

Certified shellfish dealers and enhanced retail seafood license holders shall not allow shellstock to deteriorate or decompose from exposure to high ambient air temperatures and shall deliver shellstock to a certified shellfish dealer or retail customer before such deterioration or decomposition occurs.

- B. Sales from Home Prohibited. Notwithstanding the provisions of 12 MRS §6601 (2), during the control months it is unlawful for harvesters to sell from their homes oysters and hard clams that have been taken from the designated control areas ~~Damariscotta River, the Sheepscot River, and the New Meadows River.~~
- C. Recreational Harvest Prohibited. It is unlawful to engage in the recreational harvest of oysters and hard clams harvested from the ~~Damariscotta River, the Sheepscot River, and the New Meadows River~~ designated control areas during the control months. Provided, however, that the prohibition against recreational harvest shall not apply to those holding a Limited Purpose Aquaculture license for shellfish taken from their license site or to towns with a municipal shellfish

ordinance that issues recreational licenses and administers mandatory vibrio education to recreational harvesters prior to licensing.

- D. Mandatory Training. All harvesters and certified shellfish dealers who take oysters and/or hard clams from the designated control areas Damariscotta River, the Sheepscot River, and the New Meadows River or who purchase oysters and/or hard clams from harvesters that were taken from the designated control areas Damariscotta River, the Sheepscot River, and the New Meadows River shall participate in annual, mandatory training provided by the DMR. Any harvester or dealer whose product is implicated in an epidemiologically linked case of Vibrio illness shall take a refresher training provided by DMR.
- ~~E. Mandatory Ambient Air Temperature Records. All harvesters who take oysters and/or hard clams from the Damariscotta River, and the Sheepscot River shall use one of two methods to record ambient air temperature: a continuous ambient air temperature data recorder with a record on the harvester's temperature collection data sheet of the maximum air temperature during the time of harvest; or data collected from a DMR-designated local weather station with a record of the maximum air temperature during the time of harvest. Any harvester or dealer whose product is implicated in an epidemiologically linked case of Vp shall provide their continuous ambient air temperature data recorder to DMR if applicable, otherwise the maximum recorded air temperature from the DMR-designated weather station will be used.~~
- F. Mandatory Vp Harvest/Purchase Plan By ~~March~~ April 1<sup>st</sup>. All harvesters ~~and~~ certified shellfish dealers ~~and enhanced retail seafood license holders~~ who take oysters and/or hard clams, buy or wet store oysters and/or hard clams from the designated control areas Damariscotta River, the Sheepscot River, and the New Meadows River shall submit to DMR a Vp harvest/purchase plan on DMR approved forms. This plan must be submitted on or before ~~March 1<sup>st</sup>~~ April 1<sup>st</sup> annually in order to be able to operate during the control months. The harvest/purchase plan must be reviewed, amended if necessary, signed and dated by the harvester, ~~or shellfish dealer~~ or enhanced retail seafood license holder before submission to DMR. The DMR will approve or deny the plan within 30 days and notify the applicant in writing of their decision. If the plan is denied, the applicant will have an opportunity to correct the deficiencies. Harvesters ~~and~~ shellfish dealers ~~and enhanced retail seafood license holders~~ may not harvest, buy or wet store oysters or hard clams during the control months without a DMR approved harvest/purchase plan. The harvest/purchase plan must include;
- (1) For Harvesters:
- a. Harvest process from time of harvest to delivery to a certified shellfish dealer or enhanced retail seafood license holder.
  - ~~b. Temperature collection including recording the maximum air temperature during the harvest activities. An example data sheet should be included with the plan.~~
  - c. Cooling processes such as resubmergence procedures, shading, wetting, and icing.
  - d. Product handling and data recording including ~~documentation of temperature history and~~ resubmergence times. Details on how lots are identified and kept separate depending on their exposure history must be included. An example data sheet should be included with the plan.
  - e. Conveyance methods including how shellstock are held and transported from time of harvest to point of sale, resubmergence or wet storage.

- f. Contingency plan if control plan is violated including resubmergence for aquaculture lease or permit holders, wet storage by a certified shellfish dealer or destruction of shellstock.

(2) For Dealers and Enhanced Retail Seafood License Holders:

- a. Receiving process including documentation of ~~maximum air temperature during harvest,~~ time of harvest, verification of harvesters' training and harvest plan requirements and time of delivery.
- b. Temperature control measures and documentation that ensures product reaches 50°F internal temperature within ~~ten~~ three hours of receiving product. Product may not be reshipped before it reaches 50°F internal temperature.
- c. Provisions for maintaining and continuing cooling that was initiated by ~~the~~ harvesters utilizing Control Plans with immediate icing.
- d. Dealers with a buying station permit may purchase oysters and/or hard clams from the designated control areas provided that they use ice to initiate immediate cooling in the conveyance.
- g. Contingency plan if control plan is violated including resubmergence for aquaculture lease or permit holders, wet storage by a certified shellfish dealer or destruction of shellstock.

115.05 Harvest Restrictions During Control Months

A. ~~For the Damariscotta River and the Sheepscot River~~ Control Plans that do not include immediate icing:

- ~~(1) The temperature shall be determined at the time of harvest using a continuous ambient air temperature data recorder or data from a DMR designated weather station and recorded on the temperature collection data sheet.~~
- (2) All oysters and hard clams shall be transferred to a certified shellfish dealer or enhanced retail seafood license holder and put into temperature control, wet storage or depuration within two (2) ~~five (5)~~ hours of the time of harvest ~~and put into temperature control.~~
- (3) All oysters and hard clams shall be subject to shading immediately after harvest.
- (4) All oysters and hard clams that are harvested and exposed to ambient temperatures for more than two (2) ~~five (5)~~ hours but less than twelve (12) hours must be resubmerged or wet stored by a certified shellfish dealer for no less than 24 hours or destroyed.
- (5) All oysters that are harvested and exposed to ambient temperatures for twelve (12) hours or more must be resubmerged or wet stored for no less than seven (7) days or 168 hours or destroyed.

B. ~~For the New Meadows River~~ Control Plans that include immediate icing:

- (1) All oysters and hard clams shall be subject to shading immediately after harvest.

- (2) All oysters and hard clams shall be adequately iced ~~onboard~~ immediately after harvest and maintained on ice until delivery to a certified dealer or enhanced retail seafood license holder under the time to temperature regulations in Chapter 94.04.

~~115.06 Additional Harvest Restrictions During Control Months For 80° F and above Air Temperatures for the Damariscotta River and the Sheepscot River~~

~~The temperature shall be determined at the time of harvest using a continuous ambient air temperature data recorder or data from a DMR-designated weather station and recorded on the temperature collection data sheet.~~

~~All oysters and hard clams shall be transferred to a certified shellfish dealer within two (2) hours of the time of harvest and put into temperature control.~~

~~All oysters and hard clams shall be subject to shading immediately after harvest.~~

~~All oysters and hard clams that are harvested and exposed to ambient temperatures for more than two (2) hours but less than twelve (12) hours must be resubmerged or wet stored by a certified shellfish dealer for no less than twenty-four (24) hours.~~

~~All oysters that are harvested and exposed to ambient temperatures for twelve (12) hours or more must be resubmerged or wet stored for no less than seven (7) days or 168 hours.~~

115.07 Noncompliance

Shellstock received by a certified dealer or enhanced retail seafood license holder without time of harvest recorded on the harvest tag, in exceedance of two (2) hours from time of harvest and/or without adequate ice shall be ~~resubmerged~~ placed in an approved wet storage system for seven (7) days or 168 hours or destroyed.

115.08 Reporting of Violations

Harvesters and certified shellfish dealers are required to report observed violations of the Vibrio Control Plan immediately to Marine Patrol.

~~115.09 Effective Date~~

~~\_\_\_\_\_ The effective date of Chapter 115 shall be January 1, 2016.~~

# 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 115 *Vibrio parahaemolyticus* Control Plan

STATUTORY AUTHORITY: 12 M.R.S. §6171-A

DATE AND PLACE OF PUBLIC HEARING(S): None scheduled

COMMENT DEADLINE: February 12, 2021

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

This rule incorporates designated portions of the Scarborough and Nonesuch Rivers and Spinney Creek into the existing *Vibrio parahaemolyticus* (*Vp*) control plan in order to reduce the likelihood that American and European oysters (*Crassostrea virginica* and *Ostrea edulis*) and hard clams (*Mercenaria mercenaria*) harvested from these areas will cause *Vp* infections in consumers. It also updates elements of control plans to reflect best practices concerning time and temperature protocols. It also permits recreational harvest in designated control areas, so long as the municipality meets the requirements specified in the proposed regulation.

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)]

The proposed regulations would apply to persons engaged in the harvesting and handling of American and European oysters and hard clams grown in the designated control areas.

BRIEF SUMMARY OF RELEVANT INFORMATION CONSIDERED DURING DEVELOPMENT OF THE RULE

The designated areas of the Scarborough and Nonesuch Rivers and Spinney Creek have the environmental characteristics (primarily water and air temperature and salinity) that potentially pose a threat to public health with regard to *Vp* infections. Research indicates that the most reliable way to minimize potential *Vp* illnesses is to utilize time and temperature controls. The proposed rule would require harvesters and dealers in control areas to update some elements of time and temperature controls to continue to minimize any potential for *Vp* related illnesses.

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

Enforcement of these proposed amendments will not require additional activity in this Agency. Existing enforcement personnel will monitor compliance during their routine patrols.