

ITEM

16-163

To hold a Public Hearing date to consider and act on amendments to
Chapter 223 (Shellfish Conservation) of the Cumberland Code,
as recommended by the Shellfish Conservation Commission



PAUL R. LEPAGE
GOVERNOR

STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES
21 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0021

PATRICK C. KELHER
COMMISSIONER

August 1, 2016

To Whom It May Concern,

The Department of Marine Resources (DMR) has become aware of an issue that may affect your municipal shellfish ordinance and your municipality's ability to enforce conservation closures. All municipal shellfish ordinances should include explicit language identifying conservation closures **and must also prohibit** harvest within these areas. The municipal shellfish ordinance should include the following, or similar statements:

It shall be unlawful for any person to harvest, take or possess shellfish from any areas closed by the town of NAME in accordance with DMR Regulation, Chapter 7. Harvesting shellfish in a closed area is a violation of this municipality's ordinance and is punishable under MSRA Title 12 §6671.

Boundaries of conservation closures are explicitly defined in the conservation closure application submitted by the town of NAME to DMR and are part of the resulting permit issued by DMR. These permits are posted at the town office and online:

<http://www.maine.gov/dmr/shellfish-sanitation-management/programs/municipal/ordinances/towninfo.html>.

The term "shellfish" should be defined in the municipal shellfish ordinance as those species included in the municipal shellfish conservation program (e.g. "Shellfish" means soft shelled clams).

DMR understands that ordinance changes often require a town meeting to adopt and encourage towns to add this language into their municipal shellfish ordinances as soon as practically possible. This will ensure that any enforcement of illegal harvesting in conservation closed areas can be addressed by the local authorities.

If you have any questions, don't hesitate to contact your area biologist:

Peter Thayer (NH border to Boothbay) – 633-9539 or pete.thayer@maine.gov

Hannah Annis (Newcastle to Frenchmans Bay) – 949-4498 or hannah.annis@maine.gov

Heidi Leighton (Bar Harbor to Canadian border) – 434-5922 or heidi.leighton@maine.gov

Sincerely,

Kohl Kanwit
Director, Bureau of Public Health

*The following Code does not display images or complicated formatting. Codes should be viewed online.
This tool is only meant for editing.*

Chapter 223

Shellfish Conservation

[HISTORY: Adopted by the Town Council of the Town of Cumberland 5-24-2004, as amended through 11-28-2011. Subsequent amendments noted where applicable.]

§ 223-1 **Title.**

This chapter shall be known and cited as the "Shellfish Conservation Ordinance of the Town of Cumberland, Maine."

§ 223-2 **Authority.**

This chapter is enacted in accordance with 12 M.R.S.A. § 6671, as amended from time to time.

§ 223-3 **Purpose.**

The purpose of this chapter is to establish a shellfish conservation program for the Town of Cumberland which will ensure the protection and optimum utilization of shellfish resources within its limits. These goals will be achieved by means which may include:

- A. Licensing.
- B. Limiting the number of shellfish harvesters.
- C. Restricting the time and area where digging is permitted.
- D. Limiting the minimum size of clams taken.
- E. Limiting the amount of clams taken daily by a harvester.

§ 223-4 **Findings.**

It is hereby determined as follows:

- A. The clam flats of the Town are a very valuable shellfish resource which is important to the local economy.
- B. These flats are not an inexhaustible resource, and therefore they must be prudently managed in order to remain viable.
- C. As part of the management process, it may be necessary to restrict the taking of shellfish by limiting the number of shellfish licenses, restrict the size and quantity of shellfish which may be harvested, and take other measures as outlined in this chapter.

§ 223-5 **Definitions.**

As used in this chapter, the following terms shall have the meanings indicated:

GUEST

One guest shall be permitted to assist a licensed recreational shellfish harvester to harvest one peck of clams per day. The license holder and guest combined may possess no more than one peck of shellfish per day.

JUNIOR LICENSE

A junior license shall be issued to all minors from the age of 12 to 16 at a reduced cost.

LOT

The total number of soft-shell clams in a bulk pile. Where soft-shell clams are in a box, barrel or other container, the contents of each box, barrel or other container constitutes a separate lot.

MUNICIPALITY

The Town of Cumberland, Maine.

NONRESIDENT

Anyone not qualified as a resident under this chapter.

PERSONAL USE

For consumption or use by oneself, by members of the immediate family or by invited guests.

POSSESSION

To have in one's custody or control, either personally or by another who is under one's control.

RESIDENT

A person who has been domiciled in this municipality for at least 180 days prior to the time his or her claim of such residence is made or a person who has paid property taxes on property located in the Town of Cumberland in the calendar year preceding the year in which the license is being issued.

SENIOR LICENSE

Resident and nonresident licenses shall be issued to persons at least 70 years of age.

SHELLFISH

Soft-shell clams (*Mya arenaria*). State law shall apply to all other types of shellfish, including quahogs, hen clams, razor clams, and oysters (12 M.R.S.A. § 6601, Subsection 6).

TAXPAYER

The owner of real estate located in the Town of Cumberland.

TOWN

The Town of Cumberland, Maine.

TOWN-CLOSED CONSERVATION AREA

A clam flat or clam flats closed pursuant to § 223-17 of this chapter.

VOLUNTEER

A person who participates in any of the activities of the Shellfish Conservation Commission.

§ 223-6 License required.

- A. A municipal shellfish license is required. It is unlawful for any person to dig or take shellfish from the shores and flats of this municipality without having a current, valid license issued by this municipality as provided by this chapter.
- B. No person shall be issued a municipal shellfish license who, upon the time of request, has failed to

appear in court for a shellfish violation or has failed to pay any outstanding shellfish violation fines.

§ 223-7 **Harvesting.**

- A. The harvesting of shellfish within the Town of Cumberland is permitted only during those hours starting 1/2 hour before sunrise and ending 1/2 hour after sunset. It is unlawful to harvest shellfish during the time starting 1/2 hour after sunset to 1/2 hour before sunrise.

~~B. In an effort to maintain shoreline stability, shellfish harvesting is prohibited within two feet of eelgrass areas (*Zostera marina*) and salt marsh cord grass (*Spartina alterniflora*).~~

~~C. Harvesting of shellfish is only permitted with tools that have equally spaced tines such as a clam hoe. Using shovels and garden spades is not permitted since they result in many broken clams.~~

- ~~DB.~~ As appropriate, the Shellfish Conservation Commission may designate areas in Cumberland to be open to commercial digging. Notice shall be published in a local paper and notice shall be provided to those who have submitted completed notification forms by January 5 each year.

- ~~CE.~~ Rules shall be promulgated annually by the Shellfish Conservation Commission. The rules shall include areas for harvesting as well as a recommendation for the number of licenses to be issued each year in each category of license.

§ 223-8 **Commercial and recreational licenses.**

- A. Commercial licenses.

- (1) Annual resident commercial shellfish license. This license is available to residents and/or taxpayers of the Town of Cumberland and entitles the holder to dig and take two bushels of shellfish per day from the shores and flats of this municipality and reciprocating municipalities in the areas to be designated pursuant to § 223-7 of this chapter. The licensee will maintain an accurate log of the days harvested commercially in his or her required shellfish harvesting log, which is due by June 30 each year to the office of the Town Clerk.
- (2) Annual nonresident commercial shellfish license. This license is available to nonresidents of this municipality and entitles the holder to dig and take two bushels of shellfish per day from the areas designated pursuant to § 223-7. The licensee will maintain an accurate log of the days harvested commercially in his or her required shellfish harvesting log, which is due by June 30 of each year to the office of the Town Clerk.
- (3) Qualifications specific to commercial shellfish licenses.
 - (a) The Shellfish Conservation Commission may specifically designate the period of validity as well as the areas open to commercial harvesting each year.
 - (b) Commercial shellfish license holders are supplied with, and required to keep, a shellfish harvesting log, which must be submitted to the Town Clerk by June 30 of each year. The log will include the license holder's name and address and will show the date, location, and number of bushels harvested during each tide. Commercial license holders who do not submit harvesting logs as required will not be eligible for a commercial license during the next period of issuance of commercial licenses.
 - (c) A shellfish license must be on your person when harvesting shellfish.

- B. Recreational shellfish licenses. A person holding a recreational shellfish license may not engage in the wholesale or retail sale of any shellfish harvested under that license. Recreational shellfish licenses are not available and not valid for a person who holds a shellfish license issued by the Maine State Commissioner of Marine Resources. Resident commercial or recreational licenses may be held by a resident of either the Town of Chebeague Island or the Town of Cumberland as per the

July 1, 2007, State Legislature Act of Separation. Cumberland and Chebeague Island residents will be eligible for resident licenses in either or both communities. Maine-certified shellfish wardens of the Town of Cumberland shall be issued a recreational shellfish license.

- (1) Guest. One guest shall be permitted to assist a licensed recreational shellfish harvester to harvest one peck of clams per day. The license holder and guest combined may possess no more than one peck of shellfish per day.
- (2) Annual resident recreational shellfish license. This license is available to residents and/or taxpayers of the Town and entitles the holder to dig and take no more than one peck of shellfish per day for his or her personal use. A child 11 years or younger shall be allowed to assist a valid license holder. The license holder and child combined may possess no more than one peck of shellfish per day. A shellfish license must be on your person when harvesting shellfish.
- (3) Annual nonresident recreational shellfish license. This license is available to nonresidents of the Town and entitles the holder to dig and take no more than one peck of shellfish per day for his or her personal use. A child 11 years or younger shall be allowed to assist a valid license holder. The license holder and child combined may possess no more than one peck of shellfish per day. A shellfish license must be on your person when harvesting shellfish.
- (4) Monthly recreational shellfish license. During all months of the calendar year, a specific number of licenses will be available for issuance during each of the months and will be valid only for the month in which they are issued. (For example, if 10 licenses are available for the month of June, they will not be sold before June 1, and regardless of the day of the month they are sold, they will expire at 12:00 midnight on June 30.) This license entitles the holder to dig and take no more than one peck of shellfish per day for his or her personal use. A child 11 years or younger shall be allowed to assist a valid license holder. The license holder and child combined may possess no more than one peck of shellfish per day. A shellfish license must be on your person when harvesting shellfish.
- (5) Annual junior recreational shellfish license. This license is available to residents and nonresidents of the Town who are at least 12 years of age but no not more than 16 years of age and entitles the holder to dig and take no more than one peck of shellfish per day for his/her personal use.
- (6) Annual senior recreational shellfish license. Resident and nonresident recreational shellfish licenses shall be issued to persons at least 70 years of age.

C. Volunteer program.

- (1) Should any resident or nonresident volunteer participate in 10 or more hours of Shellfish Conservation Commission activities in a calendar year, that person shall be assured a resident or nonresident recreational license applied for in the following year (cost of the license is the responsibility of the applicant and based on availability of licenses).
- (2) Volunteer hours are to be recorded by a designee of the Shellfish Conservation Commission present for that activity in which the volunteer has participated.

§ 223-9 Fees.

[1]Fees for shellfish licenses are established by order of the Town Council.

§ 223-10 Signature on license.

The licensee must sign the shellfish license to make it valid.

§ 223-11 License application.

Applicants must submit a completed application, except as may otherwise be required by state or federal statute, to the Town Clerk for the licenses required by this chapter on forms provided by the municipality.

§ 223-12 Contents of application.

The application must be in the form of an affidavit and must contain the applicant's name, current physical address, birth date, height, weight, signature, and whatever other information the municipality may require.

§ 223-13 False information on application.

Any person who gives false information on a shellfish license application will cause said shellfish license to become invalid and void.

§ 223-14 License expiration date.

Each shellfish license issued under the authority of this chapter expires at 12:00 midnight on the 31st day of December next following date of issue, unless otherwise specified in this chapter.

§ 223-15 Reciprocal harvesting privileges.

Licensees from any other municipality cooperating with this municipality on a joint shellfish management program may harvest shellfish according to the terms of their shellfish licenses.

§ 223-16 Number of licenses; notice of period of issuance.

Because the shellfish resources are limited and because a commercial or recreational digger can be expected to harvest a certain volume of clams per year, the number of diggers must be controlled. This number will vary from year to year depending upon estimates of the resource capabilities and management requirements consistent with good resource utilization. The following procedures will be followed to exercise control:

- A. Prior to November 1 of each year, the Town Shellfish Conservation Commission, with the approval of the Commissioner of Marine Resources, shall prepare its recommendation to the Town Council of the number of resident and nonresident commercial and recreational shellfish licenses to be made available.
- B. The Shellfish Conservation Commission will notify the Town Council in Cumberland in writing prior to December 1 of the recommended number of resident and nonresident commercial and recreational shellfish licenses to be made available. The Town Council then shall adopt a shellfish license allocation. The Shellfish Conservation Commission, in preparing a recommended allocation of shellfish licenses, and the Town Council, in adopting an allocation of shellfish licenses, shall provide and reserve a minimum number of shellfish licenses for nonresidents, which shall be a number not less than 10% of the number of shellfish licenses provided for residents. When the number of commercial resident shellfish licenses is fewer than 10 but more than five, at least one nonresident commercial shellfish license shall be provided. When the number of resident commercial shellfish licenses is five or fewer, nonresident commercial shellfish licenses shall not be required.
- C. The period of issuance for shellfish licenses shall be from January 1 to December 31 each year. After March 31 any remaining shellfish licenses shall be issued to residents and nonresidents on the basis of first come, first served, unless the alternative licensing procedure described in Subsection G of this section is used.
- D. At least 10 days prior to the issuance of shellfish licenses, the Town Clerk, upon direction of the Town Council, shall provide notice of the number of shellfish licenses, resident and nonresident, and the procedure for application for such shellfish licenses by publishing the same in a trade or industry publication, or in a newspaper or combination of newspapers with general circulation which the Town Council considers effective in reaching persons affected, and by posting the same in the Town office until the period of issuance concludes.
- E. When the number of licenses is limited, the Town Clerk shall issue commercial, nonresident commercial, resident recreational and nonresident recreational shellfish licenses as allocated,

according to the following procedure:

- (1) The Town Clerk and/or Deputy Clerk shall accept applications for commercial, nonresident commercial, resident recreational and nonresident recreational shellfish licenses from resident and nonresident applicants during regular Town office hours through the month of December.
 - (2) The Clerk shall prepare a list of the names of the qualifying applicants; the list need not be in any particular order. Next to each name on the list, the Clerk shall enter a unique three-digit number, selected at random, and shall write each such number on an index card. All the index cards shall be of uniform size, color and texture.
 - (3) The numbered index cards shall then be placed in a box or other container capable of being closed and sufficiently large so the index cards can be easily mixed by shaking the container.
 - (4) The Clerk's assistant shall shake the container in order to mix the contents and shall then place or hold the container at a location above the Clerk's eye level, so that the Clerk can reach into the container and withdraw cards without seeing the numbers on the cards.
 - (5) The Clerk shall withdraw all of the cards, one by one, reading each number drawn out loud. The Clerk's assistant shall make a list of each of the numbers so drawn in the order in which they are drawn. Then, using the list prepared under Subsection **E(2)** above, the Clerk shall place the corresponding applicant's name next to each number.
 - (6) The Clerk shall then issue the available shellfish licenses to the qualifying applicants, first to residents and then to nonresidents, in the order in which their names appear on the list prepared under Subsection **E(5)**. That list shall establish the order of priority for the issuance of any commercial, nonresident commercial and nonresident recreational shellfish licenses until the next annual licensing procedure under this chapter.
 - (7) The procedure set forth in this section shall be a public proceeding, open to the public, but no applicant or any member of the public has any right to participate in the procedure. Applicants are not required to be present at the time the issuance list is established. The procedure shall be conducted at the Cumberland Town office on the date designated in the Town Clerk notice as provided in Subsection **D** and at a time set by the Town Clerk. The Clerk shall announce the exact time for the procedure by posting a notice in the Cumberland Town office at least seven days prior to the date of the procedure. Any failure to provide such notice shall not invalidate the results of the procedure.
- F. A copy of this chapter shall be given with each shellfish license issued.
- G. Alternative licensing procedures. In the event that the Shellfish Conservation Commission shall establish that no limit on recreational licenses shall be imposed, the following procedure shall govern the issuance of licenses notwithstanding the provisions of Subsections **A** through **D**:
- (1) Beginning on the first business day of January, the Town Clerk shall issue resident recreational licenses to residents upon application, said licenses to be effective that day.
 - (2) On the third business day of January, the Town Clerk shall issue nonresident recreational licenses as follows:
 - (a) As defined in § **223-8C(1)** (volunteer program), the Town Clerk shall issue nonresident recreational licenses to all eligible volunteers.
 - (b) A lottery system as defined in Subsection **E(2)** to **(7)** shall be used to allocate the remaining nonresidential recreational licenses. All nonresident recreational license applications in receipt by the Town Clerk on the day of the drawing shall be included in the lottery. All applicants will be

assigned a number in the order they are drawn and placed on a waiting list.

- (c) When 250 resident recreational licenses are sold, the Town Clerk shall issue one additional nonresident recreational license to the next waiting list applicant. Thereafter, one additional nonresident recreational license shall be issued to the next applicant on the waiting list upon sale of 10 additional resident recreational licenses.
- (d) Any person notified by the Town Clerk that they have been selected from the waiting list for a nonresident recreational license shall pay the applicable license fee within 14 business days of the mailing of said notice of eligibility. In the event that the person fails to make an application, qualify, or pay the license fee within the prescribed time period, he or she shall be returned to the end of the waiting list.
- (e) Any person making application for a nonresident recreational license after the drawing date shall be placed at the end of the waiting list.
- (3) Resident senior citizen licenses issued shall not be counted in the calculation of licenses sold under this section.
- (4) Recreational licenses issued to Maine-certified shellfish wardens of the Town of Cumberland shall not be counted in the calculation of licenses sold under this section.

§ 223-17 Opening and closing of flats.

The Shellfish Conservation Commission, with the approval of the Commissioner of Marine Resources, may open and close areas for shellfish harvesting and designate areas and time periods for commercial or recreational harvesting thereon. Upon concurrence of the Department of Marine Resources area biologist that the status of the shellfish resources and other factors bearing on sound management indicate that an area should be opened or closed for either recreational or commercial harvesting, the Shellfish Conservation Commission may call a public hearing on 10 days' notice published in a newspaper having general circulation in the Town, stating the time, place, and subject matter of the hearing, and shall send a copy of the notice to the Department of Marine Resources. The decision of the Shellfish Conservation Commission made after the hearing shall be based on findings of fact.

It shall be unlawful for any person to harvest, take or possess shellfish from any areas closed by the town of Cumberland in accordance with DMR Regulation, Chapter 7. Harvesting shellfish in a closed area is a violation of this municipality's ordinance and is punishable under MSRA Title 12 §6671.

Boundaries of conservation closures are explicitly defined in the conservation closure application submitted by the town of Cumberland to DMR and are part of the resulting permit issued by DMR. These permits are posted at the town office and online: <http://www.maine.gov/dmr/shellfish-sanitation-management/programs/municipal/ordinances/towninfo.html>.

§ 223-18 Minimum legal size of soft-shell clams.

Pursuant to 12 M.R.S.A. §§ 6671 and 6681, as amended from time to time, it is unlawful to possess soft-shelled clamshell stock whose shells are less than two inches in the largest diameter. The Town Clerk's office shall issue annually a two-inch ring with each license. For purposes of this chapter, the term "possess" means dig, take, harvest, ship, transport, hold, buy, and sell retail and wholesale soft-shelled clamshell stock.

§ 223-19 Method of determining tolerance.

Pursuant to 12 M.R.S.A. §§ 6671 and 6681, as amended from time to time, any person may possess soft-shelled clams that are less than two inches if they comprise less than 10% of any bulk pile. The tolerance shall be determined by numerical count of not less than one peck or more than four 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.

§ 223-20 Shellfish Conservation Commission.

The Shellfish Conservation Program for the Town of Cumberland will be administered by the Shellfish Conservation Commission consisting of seven members. The Cumberland Town Council will appoint the Shellfish Conservation Commission members. In addition, the Shellfish Conservation Warden shall serve as an ex officio member. The Commission's responsibilities include:

- A. Establishing, annually, in conjunction with the Department of Marine Resources, the number of shellfish digging licenses to be issued.
- B. Surveying the clam flats to maintain current information on shellfish resources.
- C. Submitting to the Town Council proposals for the expenditures of funds for the purpose of shellfish conservation.
- D. Keeping this chapter under review and making recommendations for its amendment.
- E. Securing and maintaining records of shellfish harvest from the Town's managed shellfish areas and closed areas that are conditionally opened by the Department of Marine Resources.
- F. Recommending conservation closures and openings to the Town Council in conjunction with the Department of Marine Resources.
- G. Submitting an annual report to the municipality and the Department of Marine Resources covering the above topics and all other Commission activities.

§ 223-21 Enforcement; violations and penalties; term.

- A. Enforcement. The Chief of Police, members of the Cumberland Police Department, special police officers as provided in 30-A M.R.S.A. § 2672, and the Shellfish Conservation Warden shall enforce this chapter.
- B. Penalty. A person who violates this chapter shall be punished as provided in 12 M.R.S.A. § 6671, as amended from time to time.
- C. Duration. This chapter shall remain in effect until amended or repealed.

§ 223-22 Misrepresentation.

It shall be unlawful and a violation of this chapter for any person to falsify or give false information in connection with a shellfish license application. In addition to any criminal penalties which may result from a violation of this chapter, the shellfish license granted to any person who gives false information on a shellfish license application will automatically be void.

§ 223-23 Suspension of license.

- A. Violation of this chapter. The Town Clerk shall suspend any and all shellfish licenses issued under this chapter if the license holder is convicted in court of violating any section of this chapter.
- B. Suspension based on conviction in a Town-closed conservation area. The Town Clerk shall suspend any and all shellfish licenses issued under this chapter if the license holder has been convicted in court of possessing shellfish from a Town-closed conservation area.
- C. Length of suspension for Subsections **A** and **B** above. The suspension of a license may not exceed the following:
 - (1) Thirty days from the date of first conviction.
 - (2) Three hundred sixty-five days (one year) from the date of the second conviction.

(3) Lifetime revocation of shellfish license for all third violations.

D. Applicable standards. Any conviction more than three years before last conviction shall not be counted in determining lengths of suspension.

§ 223-24 Suspension based on refusing inspection.

The Town Clerk shall suspend any and all shellfish licenses if the license holder refuses to allow inspection in the enforcement of this chapter. This suspension may not exceed 90 days.

§ 223-25 Hearing on license suspension.

Any licensee whose shellfish license has been suspended shall be entitled to a hearing before the Town Manager, upon the filing of a written request for hearing with the Town Manager within 30 days following the effective date of suspension. The applicant shall be given at least seven days' prior written notice of the date, time and place of hearing before the Town Manager. Any person aggrieved by the Town Manager's decision may appeal to the Superior Court within 30 days from receipt of the Town Manager's written decision pursuant to Rule 80B of the Maine Rules of Civil Procedure.

§ 223-26 Enforcement officers.

The Cumberland Police Department shall be the legal enforcement agency for the enforcement of this chapter. The Chief of Police shall designate an officer or officers certified by the Department of Marine Resources to enforce violations of this chapter and conduct required water quality sampling.

§ 223-27 Unlawful washing or holding of shellfish.

A person may not:

A. Wash, hold or keep shellfish in any area closed by state regulation.

B. Possess, ship, transport or sell shellfish washed, held or kept in any area closed by regulation per 12 M.R.S.A. § 6621.