

Section 1. Definitions

License Holder - A natural person or natural persons, ~~or a firm or corporation~~ holding a license issued by the Selectboard under the provisions of MGL Chapter 130.

Commented [RC1]: This is for clarity, eligibility requirements refer back to the definition of a resident. Consistency is essential in making regulations easier to interpret

Taxpayer – An individual or ~~officers of a corporation or beneficiaries of a trust~~ who that owns land in Wellfleet for which they are taxed by the Town.

Commented [RC2]: This is used for non-commercial permits only. As currently written, only the "corporation" would be eligible to hold a resident or taxpayer non-commercial permit. Again legally, a corporation is the person and not the officers, shareholders, or beneficiaries

Resident - A declared natural person and resident of the Town of Wellfleet. Written proof that Wellfleet is the domicile as well as the legal residence of the applicant shall be required to the satisfaction of the Shellfish Constable and Selectboard. Domicile will be established after one year of residency in Wellfleet is demonstrated. Proof of legal residence may include voter registration, automobile registration, driver's license, income tax filings, census data, or passport.

Selectboard - The Wellfleet Selectboard (~~BOSSB~~); Wellfleet's elected executive Board, designated by the State (MGL Chapter 30) as the regulatory Board that has jurisdiction over shellfishing in the Town.

Transferee - ~~Individual or entity~~ A natural person to whom the right to use a previously established, licensed area for aquaculture has been granted by a vote of the Selectboard.

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4.11. License and/or Permit Required

All persons fourteen (14) years old or older engaged in taking, removing, or having in possession eels, sea worms or shellfish, including soft-shelled clams, quahogs, surf clams, sea clams, razor clams, oysters, mussels, and scallops, taken from the waters of the Town shall have an appropriate license or permit obtained and used only in accordance with all terms, conditions, and restrictions.

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6.1.4. Commercial Shellfish Permit Fee Schedule ~~(amended 12/20/2022 to require all grant license holders to purchase a commercial shellfishing permit)~~

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Resident	\$310
Senior Resident (65 years or older)	\$60
Junior Resident (14-16 years old)	\$110
Eel Permit	\$3
Replacement Fee (for all categories)	\$20

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7.2. Previously Established Grants that Become Available

In the event that a licensed aquaculture area previously certified by the DMF becomes available, its status shall be posted by the Shellfish Constable (see Section 3; Informing the Public of Meetings Concerning the Fishery) for a period of 30 calendar days. If more than one qualified person (as described in Section 1 under Domiciled Resident, and Section 7.8.1 Eligibility Requirements) whose name does not appear on another license applies to hold the license, the Selectboard shall hold a public lottery within

14 days to impartially determine who shall be granted the right to use such available acreage for aquaculture. ~~No shareholder, officer, director or other individual holding a similar position having a different title but exercising a similar role, of a corporation that currently holds an aquaculture license in Wellfleet may apply for such grants.~~

Commented [RC4]: If regs are changed as proposed this sentence is no longer applicable

7.8.1. Eligibility Requirements:

Commented [RC5]: Reformatted for clarity and added commercial permit requirement

Licenses shall only be issued to those who meet all of the following requirements:

- a) domiciled residents (See Sec.1 Definitions) of the Town, 18 years of age or older,
- b) hold a valid Commercial Shellfish Permit
- c) who have the knowledge and experience to fulfill the responsibilities specified in the license defined as either:
 - i. provided that the applicant has held and been documented by the Shellfish Department using a Wellfleet commercial shellfishing permit during a period of at least three (3) of the four (4) calendar years preceding the date of application for a license. The
applicant shall submit copies of state-filed catch reports. OR,
 - ii. provided the applicant demonstrates experience in shellfish propagation and aquaculture, continuously, over at least three (3) years preceding the date of application, documented by the Shellfish Department. This shall be supported by a letter from a license holder who employed the applicant describing the type of work performed and any other information which might be relevant.
- d) The applicant shall present a detailed five-year business plan for how ~~she~~they intends to use the grant, including shellfish species, amounts and sizes, and gear to be used, access routes and any other information relevant to proposed operations.
- e) In addition, any applicant shall not demonstrate show a pattern of violations of Wellfleet's Shellfishing Policy and Regulations within the last three (3) years.

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7.8.3. ~~Renewal of Aquaculture Licenses Terms~~

Commented [RC6]: This includes not only renewals but the issuance of any new license. So Retitled for clarity

The initial term for a new license shall be two (2) years. Provided appropriate effort has been demonstrated, as required in Section 7.12, the first renewal of a license may be for no more than five (5) years, unless the licensee agrees to a shorter term. Subsequent renewals may be for no more than ten (10) years, unless the licensee agrees to a shorter term. Renewals may be requested and acted upon only during the twenty four (24) months immediately prior to the expiration date of the current license. The renewal period shall begin on the expiration date of the existing license. Any licenses issued or renewed after April 30, 2023 shall expire on April 30th of the calendar year of their term.

Commented [RC7]: This is to mirror state language

7.9. Rights of Use and Transfer

Commented [RC8]: This reflects the move to uniform expiration periods.

Licenses shall have the exclusive use of the area described in their license for the purpose of aquaculture, for the duration of their terms. No other individual may use the license without the express permission of the licensee(s). (See Section 4.9 Poaching, Section 4.10 Disturbance of Grant by Other Than the Licensee and MGL Chapter 130;Section 57, Section 63 and Section 67.)

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Licenses may transfer the rights or responsibilities assigned to their license to any other domiciled resident/s who satisfies the eligibility requirements to hold an license ~~individuals, companies or~~

corporations by vote of the Selectboard, and with the express permission of all other individuals who hold license for the same area. (See MGL Chapter 130; Section 58 and Section 7.8.3 Limit on Individuals Licensed to Use a Grant.)

Summary

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Summary: Natural Person is an actual living person; there are instances in MGL where the term Natural Person is used to distinguish between a real person and a synthetic person or require a social security card for the same purpose.

Under **MGL Ch. 4, §7 Definitions of statutory terms; statutory construction**, a person is defined thus:

'Person' or "whoever" shall include corporations, societies, associations and partnerships.

The proposed regulations clearly distinguish between a live person and those also classified as "persons" by law, such as a corporation or other legal entity. An entity (corporation) can meet the requirements to be considered a domiciled resident. Such a "person(corporation)" can remain a domiciled resident even if the underlying ownership of the entity is not held by a domiciled resident/s or changes. A Non-Natural Person is an entity as opposed to an actual person. The eligibility requirements for an aquaculture license require a domiciled resident. A currently domiciled resident is a natural person or an incorporated person (corporation). The applicant must meet all of the eligibility requirements in and of themselves. It is critical to remember that a corporation is a person that exists independently from any officers, shareholders, managers, trustees, partners, limited partners, or directors. These proposed amendments remove the ability of any corporation to hold a license.

7.8.1. Eligibility Requirements: Licenses shall only be issued to domiciled residents (See Sec.1 Definitions) of the Town, **18 years of age or older**, who have the knowledge and experience to fulfill the responsibilities specified in the license, **provided that the applicant has held and been documented by the Shellfish Department using a Wellfleet commercial shellfishing permit during a period of at least three (3) of the four (4) calendar years preceding the date of application for a license.** The applicant shall submit copies of state-filed catch reports, **OR, provided the applicant demonstrates experience in shellfish propagation and aquaculture, continuously, over at least three (3) years preceding the date of application, documented by the Shellfish Department.** This shall be supported by a letter from a license holder who employed the applicant describing the type of work performed and any other information which might be relevant. The applicant shall present a detailed five-year business plan for how s/he intends to use the grant, including shellfish species, amounts and sizes, and gear to be used, access routes and any other information relevant to proposed operations. In addition, any applicant shall not show a pattern of violations of Wellfleet's Shellfishing Policy and Regulations within the last three (3) years.

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As it exists now, a corporation that meets all the requirements could be eligible to hold an aquaculture license. **I would like to point out that Duxbury allowed corporations to hold a license, and they have changed their regulations to prohibit corporations from being eligible to hold any license they**

currently hold and have a 2 acre maximum. Those that currently hold a license are allowed to continue to hold it, but no other licenses can be issued to any corporation.

From March 3, 2022, Opinion from Greg Corbo KP Law on Residency Requirements in regards to a Corporation:

...“Rather, to determine a corporation’s domicile it is necessary to determine where its principal place of business is located. *Harrison v. Granite Bay Care, Inc.*, 811 F.3d 36, 40 (1st Cir. 2016)...”

“Where, however, a corporation performs its business in more than one location, the United States Supreme Court has established the so-called “nerve center” test to determine the location of a corporation’s principal place of business. *Hertz Corp. v. Friend*, 559 U.S. 77, 80–81 (2010). A corporation’s “nerve center” (i.e., its principal place of business) is the particular location from which its “officers direct, control, and coordinate the corporation’s activities.” *Harrison*, 811 F.3d at 40 (quoting, *Hertz*, 559 U.S. at 92–93). Generally speaking, this will “be the place where the corporation maintains its headquarters, provided that the headquarters is the actual center of direction, control, and coordination ... and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have traveled there for the occasion).” *Id.*” 03.03.2022

For Reference, the Purpose of the Regulations

Section 2. Shellfishing Policy for the Town of Wellfleet Purpose of Regulations The purpose of these regulations is to foster, protect and preserve Wellfleet’s shellfish resources and habitats, to maintain and improve conditions permitting sustainable, productive shellfishing and aquaculture, to ensure equitable use of the resource for all persons legally engaged in these activities, and to provide appropriate protection for the reasonable and legitimate interests of all others affected by shellfishing.

To that end, these regulations supplement and are consistent with the requirements of the State of Massachusetts including 10 Massachusetts General Law Chapter 130, Code of Massachusetts Regulations 322, and the current Best Management Practices for the Shellfish Culture Industry in Southeastern Massachusetts, developed by SEMAC (Southeastern Massachusetts Aquaculture Center). To implement this policy, the Selectboard may restrict the taking of shellfish by commercial or noncommercial permit holders in any area or in any manner for the purpose of managing the fishery.

The Selectboard will license areas of intertidal land in such a manner as will allow as many licensed areas as are economically and environmentally practical for any such parcel of intertidal land approved for licensing. Because much of the area that is used for shellfishing and shellfish aquaculture is a precious natural resource that is owned by the Town, and because best use of such intertidal land is made by those who are geographically present and personally accountable to the community, the granting of commercial permits and licenses for aquaculture is restricted to domiciled residents of Wellfleet.

Further complicating things is that there are multiple types of corporations. Any regulation that would allow corporations would have to be crafted to address the organizational structure of the various kinds

of corporations and how those requirements are interrelated. Regulation regarding corporations would require significant efforts by the Shellfish Department to enforce and monitor. This monitoring would be complex at best, but at scale, it would present an impossible task. The number of facets that would need to be continuously monitored is lengthy, and more likely than not, the added complexity will create confusion and potential loopholes.

Wellfleet's shellfish industry is unique in the state in the number of families it supports. Much of the revenue derived from it is retained within the town. It does not need a radical change in how it is conducted. There is significant value in maintaining the status quo. Effectively what a corporate structure does is that it creates a perpetual license which is a final instrument that can be bought or sold. This is the very thing that the shellfishers organized against in 2018-2020. There are many options to reduce liability and protect assets. I do recommend that aquaculturists look into how they can best protect themselves. Protections include holding insurance policies and moving personal assets such as property into a trust.

Suppose an aquaculturist has a company that has employees and that can include the shellfisher themselves by the way, workplace injuries would be covered under the workmen's comp policy of the company. A consumer getting sick from vibrio or norovirus and the producer has a considerable degree of isolation from that perspective risk provided they follow the management practices approved by the state. Consumers occasionally getting sick from consuming raw shellfish is a known risk of consuming shellfish; as long as that risk is disclosed to them, the consumer has accepted the risk. In terms of exposure, the restaurant or retail market must always disclose that there is a risk in consuming raw seafood. This is why at the bottom of every menu there at a restaurant, there is disclosure. All shellfish are required to be sold to an "original dealer" with a HACCP facility. These facilities assume most of the remaining risks and should have insurance policies to match. If the shellfisher has its own approved facility, this should be in a separate corporation.

Regarding the public potentially injuring themselves due to gear, there would be very little protection offered to corporate directors or officers. As such, they could be found personally liable. However, if the aquaculturist follows the regulations, explicitly marking the grant and the gear is at an acceptable height, this would be a known hazard. There is a standard called duty of care, and when it comes to bathers, "there is no general right of the public to pass over the [tidal flats] or to use it for bathing purposes" (Wellfleet v. Glaze, 403 Mass. 79, 85 (Mass.1988)). In terms of boaters, navigational hazards need to be marked on a map. The Harbormaster and the Shellfish Constable have worked hard on producing a map that shows where these hazards are in addition to clearly marking the grant as required, further serves to provide clear indications of potential navigational hazards, and it is the responsibility of the boater to avoid navigational hazards.