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January 11, 2016

Peter Joseph, Town Manager
Town of Freeport
30 Main Street
Freeport, Maine 04032

Re: Freeport Shellfish Ordinance

Dear Peter:

Upon your request, I have had an opportunity to review the proposed amendments to the Freeport Shellfish Ordinance which would establish a pilot municipal shellfish aquaculture permitting program. In general, I think the proposal is well drafted and complies with the requirements in 12 M.R.S. § 6673, the state law that authorizes such pilot projects. I do have a few questions and clarifications for the Ordinance Committee to consider below; my few minor edits are attached in redline to this letter:

1. **Generally** – There is already a Section 32-1001 entitled “Effective Date” in the Shellfish Ordinance. I suggest either re-numbering the new aquaculture provisions as Section 32-1101, or amending the Ordinance to show the existing Section 32-1001 as deleted and replaced with the new provisions - since there is an identical effective date provision already included in Section 32-301(1). Either way, I would add change the effective date sentence to read: “This Ordinance which has been approved by the Commissioner of Marine Resources shall become effective upon its adoption or amendment by the Municipality.”
2. **Section 2 – Pilot Project**
 - a. **Termination of program.** Since the Town Council has the ultimate authority to enact and terminate ordinances, I recommend that the Town Council, instead of the Commission, retain the authority to extend the program beyond the initial five years. Additionally, I would clarify that although a permit issued before the program terminates continues in effect for the full term, there will be no permit renewals of those permits.

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“A municipal shellfish aquaculture permit is renewable upon application by the permittee and approval by the Commission. The process outlined in Section 6 applies to an application for renewal of a municipal shellfish aquaculture permit and the Commission's consideration of the application.”

I hope this is helpful. Please let me know if I can be of further assistance as the Council reviews these proposed amendments.

Sincerely,



Philip R. Saucier

PRS/rl

OB #2 SHELLFISH ORDINANCE

Freeport Shellfish Ordinance Proposed Amendment

Section 32-1001 - Municipal Shellfish Aquaculture Permitting

Section 1 - General

Authority. These ordinance provisions are enacted pursuant to and in accordance with 12 M.R.S.A. §§ 6671 and 6673.

Purpose. These ordinance provisions establish the Municipal Shellfish Aquaculture Permitting Program within the Town of Freeport. Consistent with Section 32-201 of the Town of Freeport Shellfish Conservation Ordinance, and in particular items F, I, and J, the purpose of the Municipal Shellfish Aquaculture Permitting Program is to protect and optimize Freeport's shellfish resources through introduction and support of sustainable aquaculture practices.

Section 2 - Pilot Program

This Municipal Shellfish Aquaculture Permitting Program is initially established as a pilot program. Unless otherwise extended by the ~~Commission~~Town Council, the Municipal Shellfish Aquaculture Permitting Program shall terminate five years after the first effective date of the Municipal Shellfish Aquaculture Permitting ordinance provisions. However, all permits issued under the pilot shall remain in full effect for the full term of the permit and shall not be automatically terminated at the conclusion of the pilot, although there will be no renewals granted. For example, a permit for a five-year term that is issued in the fourth year of the pilot, shall remain in effect for the full five-year term of the permit, notwithstanding the termination of the pilot, so long as the permittee and the permittee's permit otherwise remain in compliance with all applicable federal, state and municipal laws, rules and regulations, and the terms and conditions of the permit as in force and amended from time to time.

As a pilot program, the number of municipal aquaculture permits shall be limited as follows:

1. In the first year of the Municipal Shellfish Aquaculture Permitting Program, the total number of permits issued by the Commission shall be no more than five permits.
2. By the end of the second year of the Municipal Shellfish Aquaculture Permitting Program, the total number of the permits issued by the Commission shall be no more than five permits.
3. By the end of the third year of the Municipal Shellfish Aquaculture Permitting Program, the total number of the permits issued by the Commission shall be no more than eight permits.
4. By the end of the fourth year of the Municipal Shellfish Aquaculture Permitting

Program, the total number of the permits issued by the Commission shall be no more than ten permits.

5. By the end of the fifth year of the Municipal Shellfish Aquaculture Permitting Program, the total number of the permits issued by the Commission shall be no more than ten permits.

Location

Under the pilot program, permitted sites will be in Town of Freeport intertidal land on the east shore of ~~recompence~~-Recompence on sites conducive to shellfish aquaculture and that permit comprehensive evaluation of shellfish aquaculture potential in the Town of Freeport. Specifically, sites permitted during the pilot are limited to the thirty-five acre area defined by the following global positioning system ("GPS") coordinates:

Northwest

43° 49.535'N 70° 4.126'W

Northeast

43° 49.445'N 70° 3.912'W

Southeast

43° 49.244'N 70° 4.071'W

Southwest

43° 49.333'N 70° 4.282'W

Should all or part of the pilot project site prove unacceptable for shellfish aquaculture due to conflict with state law, or riparian rights or because the site is not otherwise conducive to shellfish aquaculture, alternate location(s) conducive to shellfish aquaculture as designated by the Commission will be sought.

Application

Under the pilot program, there will be a two week period for submission and acceptance of applications by eligible applicants for permits. Should there be more eligible applicants than may be accommodated under the permittee limits set forth above (during any year of the pilot program) a lottery system will be used to select from among approved permittees, which in addition will determine the order in which selected and approved permittees may select permit locations within the location/s designated by the Commission.

Section 3 - Permits

1. Pursuant to 12 M.R.S. § 6673 and these provisions of the Freeport Shellfish Conservation Ordinance, any current holder of a Freeport commercial shellfish license, except for the holder of a student commercial license, may apply for a municipal aquaculture permit for the exclusive use of shellfish by the permittee in a designated area in the intertidal zone to the extreme low water mark within the Town of Freeport for the purpose of shellfish

aquaculture. In deciding whether to issue a municipal aquaculture permit, the Commission shall consider the ~~faetors~~criteria set forth in Section 4 and the conditions set forth in Section 5. The procedure established in Section 6 shall apply to the Commission's consideration of the application for a municipal aquaculture permit.

A municipal aquaculture permit may be renewed pursuant to Section 7.

2. A municipal aquaculture permit issued under Section 32-1001 shall be for a term of no greater than five years, and is subject to renewal for subsequent five year terms.
3. The total number of acres permitted under municipal aquaculture permits in the Town shall not exceed one quarter of the entire municipal intertidal zone that is open to the taking of shellfish.
4. A single permittee may not hold under a permit more than three acres total.

Section 4 - ~~Faetors~~Criteria

In evaluating a proposed municipal shellfish aquaculture permit, the Commission shall take into consideration the number and density of permits in the area and may issue the permit if the Commission finds the proposed permit meets the following criteria.

- A. The permit conforms to the Town's shellfish conservation program.
- B. The permit will not cause the total area under all municipal shellfish aquaculture permits in the Town to exceed twenty-five percent of the entire municipal intertidal zone that is open to the taking of shellfish.
- C. Issuing the permit is in the best interests of the Town.
- D. The permit will not unreasonably interfere with ingress and egress of riparian owners or present unreasonable visual or noise impacts.
- E. The permit will not unreasonably interfere with navigation.
- F. The permit will not unreasonably interfere with fishing or other uses of the area. For purposes of this paragraph, "fishing" includes public access to a redeemable shellfish resource, as defined by the Department of Marine Resources, for the purpose of harvesting, provided that the resource is commercially significant and is subject to a pollution abatement plan that predates the permit application, that includes verifiable activities in the process of implementation and that is reasonably expected to result in the opening of the area to the taking of shellfish within 3 years.
- G. The permit will not unreasonably interfere with significant wildlife habitat and marine habitat or with the ability of the site affected by the permit and surrounding marine and upland areas to support existing ecologically significant flora and fauna.
- H. The applicant has demonstrated that there is an available source of organisms to be cultured for the site affected by the permit.

1. The permit does not unreasonably interfere with public use or enjoyment within 1,000 feet of a beach, park or docking facility owned by the Federal Government, the State Government or a municipal government or conserved lands. For purposes of this paragraph, "conserved lands" means land in which fee ownership has been acquired by the municipal government, State Government or Federal Government in order to protect the important ecological, recreational, scenic, cultural or historic attributes of that property.

The Commission shall review the Department of Agriculture, Conservation and Forestry's list of conserved lands compiled pursuant to 12 M.R.S. § 6072, subsection 7-A, paragraph F prior to issuing a municipal shellfish aquaculture permit.

For each permit application, the Commission shall make findings with respect to each of the ~~facto~~scriteria listed in Section 4, put its findings on each of the ~~facto~~scriteria in writing and make those findings available to the public.

Section 5 - Conditions

The following conditions apply to a municipal aquaculture permit. The failure to comply with any the conditions may result in the termination of a permittee's permit.

1. The applicant for a Freeport municipal aquaculture permit must possess a current commercial shellfish license issued by the Town of Freeport pursuant to Section 32-601 (except that possession of current commercial student shellfish license does not qualify an applicant for a permit).
2. The permittee must continually possess a current commercial shellfish license issued by the Town of Freeport pursuant to Section 32-601 during the full term of the permit.
3. The permittee must make reasonable efforts to continually cultivate shellfish in the permitted area. A permittee may not hold a municipal aquaculture permit speculatively.
4. The permittee may cultivate shellfish in the permitted area on any day of the week, but only during daylight hours. Further, harvesting cultivated shellfish from the permitted area may only occur on those days and during those times when the harvesting of uncultivated, wild shellfish is permitted.
5. The permittee must pay a permit fee annually for each year of the permit. The permit fee is \$100 per acre annually. The first year's annual permit fee is due within 30 days of the date upon which the Commission issued a permit. The permit fee is due annually thereafter (e.g. the second year's permit fee is due within 1 year and 30 days of date upon which the Commission issued a permit). All permit fees shall be dedicated to the municipal aquaculture permitting program fund.
6. The permittee shall be responsible for obtaining any landowner permissions in writing, to the extent required by law.

All fees must be paid to the Town Clerk.

The application fee set forth in Section 56(3) is separate from the annual permit fee, and payment of the application fee does not constitute payment of the annual permit fee.

7. By December 31 of each year during the permit period (or at such other time as the Commission may require), the permittee shall provide a written report to the Commission on the status of the permit, including (a) a description of the efforts made to cultivate shellfish in the permitted area, including the total acreage under cultivation; (b) the type of shellfish harvested from the permitted area; (c) the amount of each type of shellfish harvested from the permitted area (i.e. the landings by type); and (d) such other information as the Commission may require.

8. The Commission and the Town shall monitor and enforce the terms and conditions of a permit on an annual basis and may alter or refine the terms and conditions of a permit as deemed appropriate and necessary.

9. The Commission may establish other reasonable conditions associated with individual permits as the Commission may deem necessary. For example, and without limitation, the Commission may ~~adopt~~ place conditions in individual permits to address noise and visual impacts that could impact riparian owners.

10. The Commission shall submit an annual report on permit activities to the Maine Department of Marine Resources. Such information is considered landings data.

Section 6 - Process

The following process applies to the application for municipal shellfish aquaculture permit and the Commission's consideration of the application.

1. The application for a municipal shellfish aquaculture permit shall be submitted in writing to the Town Clerk. The application shall include the application form for a municipal aquaculture permit supplied by the Town and the total application fee. It may also include such other materials that the applicant wishes to be considered by the Commission.

2. An incomplete application will not be considered by the Commission until it is complete.

3. The fee for an application is \$50 per acre proposed to be cultivated under the permit. The total fee must be paid to the Town Clerk at the time of application. If the total fee is not received by the Town at the time of application, the application is incomplete until the total fee is received.

4. The Town Clerk shall promptly transmit the application to the Commission for the Commission's consideration and send notice of applications to Freeport's Planning Board, Coastal Waters Commission, Conservation Committee, and Town Council.

5. The Town Clerk shall promptly publish a summary of the application in a newspaper of general circulation in the area that would be affected by the permit and on the Town's webpage.

6. Any person may provide written comments to the Town on the proposed permit within 30 days of publication of the summary in the newspaper or on the Town's webpage, whichever is later. The Town Clerk shall promptly transmit any such comments to the Shellfish Commission.
7. Prior to issuing a municipal shellfish aquaculture permit, the Commission shall hold a public hearing if requested in writing to the Town by five or more persons. The Town Clerk shall promptly transmit any such requests for a public hearing to the Commission. The Commission retains the right to hold a public hearing, in its discretion, even if five or more persons do not request such public hearing. The public hearing must be held in accordance with procedures established in [insert reference to Town's public hearing ordinance provisions.]
8. Upon receipt of the application by the Commission, the Commission shall consider the application in light of the factorscriteria set forth in Section 4 and the Commission shall consider any written comments provided to the Town pursuant to Section 6(6) as well as any comments made during a public hearing if such hearing is held.
9. The Commission shall issue its decision whether to grant a municipal aquaculture permit in writing. It shall make findings with respect to each of the factorscriteria listed in Section 4, put its findings on each of the factorscriteria in writing and make those findings available to the public.
10. When approved, a municipal shellfish aquaculture permit must be forwarded to the Commissioner of the Maine Department of Marine Resources.
11. Appeals of the Commission's decision to grant to deny a municipal aquaculture permit are governed by [insert reference].

Section 7 - Renewals

A municipal shellfish aquaculture permit is renewable upon application by the permittee and approval by the Commission. The following process applies to the application for renewal of a municipal shellfish aquaculture permit and the Commission's consideration of the application.

1. The application for the renewal of a municipal shellfish aquaculture permit shall be submitted in writing to the Town Clerk. The application shall include the application form for the renewal of a municipal aquaculture permit supplied by the Town and the total application fee. It may also include such other materials that the applicant wishes to be considered by the Commission.
2. An incomplete application will not be considered by the Commission until it is complete.
3. The fee for a renewal application is \$50 per acre proposed to be cultivated under the renewed permit. The total fee must be paid to the Town Clerk at the time of application. If the total fee is not received by the Town at the time of application, the application is

incomplete until the total fee is received.

4. The Town Clerk shall promptly transmit the renewal application to the Commission for the Commission's consideration and send notice of applications to Freeport's Planning Board, Coastal Waters Commission, Conservation Committee, and Town Council.

5. The Town Clerk shall promptly publish a summary of the renewal application in a newspaper of general circulation in the area that would be affected by the permit and on the Town's webpage.

6. Any person may provide written comments to the Town on the proposed renewal permit within 30 days of publication of the summary in the newspaper or on the Town's webpage, whichever is later. The Town Clerk shall promptly transmit any such comments to the Shellfish Commission.

7. Prior to renewing a municipal shellfish aquaculture permit, the Commission shall hold a public hearing if requested in writing to the Town by five or more persons. The Town Clerk shall promptly transmit any such requests for a public hearing to the Commission. The Commission retains the right to hold a public hearing, in its discretion, even if five or more persons do not request such public hearing. The public hearing must be held in accordance with procedures established in insert reference to Town's public hearing ordinance provisions.

8. Upon receipt of the renewal application by the Commission, the Commission shall consider the renewal application in light of the factoredcriteria set forth in Section 4 and the Commission shall consider any written comments provided to the Town pursuant to Section 6(6) as well as any comments made during a public hearing if such hearing is held.

9. The Commission shall issue its decision whether to renew a municipal aquaculture permit in writing. It shall make findings with respect to each of the factoredcriteria listed in Section 4, put its findings on each of the factoredcriteria in writing and make those findings available to the public.

10. When approved, the renewal of a municipal shellfish aquaculture permit must be forwarded to the Commissioner of the Maine Department of Marine Resources.

11. Appeals of the Commission's decision to grant to deny the renewal of a municipal aquaculture permit are governed by insert reference.

Section 8 - Exclusivity

Permits are issued to and for the exclusive use of the permittee, who may employ other Freeport municipally licensed commercial harvesters at the will of the permittee, including holders of student commercial licenses issued by Freeport. All such employees must be identified on the permit application. The permittee must be present on the permit-premises at all times that cultivation or harvesting related activities are performed on the permit, unless the Commission or the Marine Resource Conservation Officer grants an exception from the requirement that the permittee be present. Permits shall not be transferable or assignable and

sub-permits are not permitted.

Section 9 - Violations and Penalties

A person may not knowingly interfere with the ability of a person who holds a municipal shellfish aquaculture permit from carrying out the privileges granted to the permittee under that shellfish permit. Except for the permittee within the bounds of the permittee's permitted area, a person may not molest, take or disturb shellfish in an area that is included in a municipal shellfish aquaculture permit. A person who violates this section commits a civil violation for which a fine of not less than \$1,000, revocation of the violator's Freeport commercial shellfish license for a minimum of thirty days and appropriate restitution will be adjudged.

Section 10 - Responsibility of Gear and Tackle

The permittee assumes all liability for all the gear and tackle used on the aquaculture permit site. If any such gear or tackle is moved off the permitted site, it shall be the responsibility of the permittee to remove said gear. If within 21 days after notification to the permittee by a Marine Resource Shellfish Conservation Officer that the permittee has not complied with this requirement, the Town may cause such gear to be removed at the expense of the permittee. Every permittee shall permanently mark or tag, in a conspicuous place, each shellfish container, rack, gear, and tackle with the assigned permit number. Nets shall be marked or tagged in a conspicuous place every 200 square feet with the assigned permit number. The Marine Resource Shellfish Conservation Officer shall have the authority to waive these regulations if the presence of ice, severe weather, or other conditions hampers the ability of the permittee to comply immediately with these regulations.

Section 11 - Removal of Gear and Tackle Upon Permit Termination

When a permit is terminated or discontinued for any reason, the permittee shall be required to remove all gear and tackle from the waters and substrate within 45 days of the permit termination date. Any and all gear/tackle/equipment not removed within 45 days will be forfeited and may be removed by the Town at the expense of the permittee.

Section 12 - Markings and Boundaries

Shellfish aquaculture permitted sites must be marked at all corners and changes in angles by a uniform yellow buoy, not less than 11.5 inches in shortest diameter, and bear the Town's assigned permit number along with "SEA FARM" in three inch block letters. When the tidelands are exposed during low tide events, the corners and angles must be marked with 1 inch by 1 inch yellow grade stakes minimum of 36 inches in height, except that lower profile boundary markings may be allowed under winter conditions. Any proposed alternative marking of a permitted area must be submitted in writing to the Commission and if in the discretion of the Commission changes are warranted, the changes may be approved in writing.

The Commission or the Marine Resource Conservation Officer may direct permittees of permitted areas that border navigational channels to use specific buoys to mark the permitted

area boundaries for navigational purposes. Each permittee is responsible for maintaining buoys marking their aquaculture permit area. Failure to place or reasonably maintain said buoys shall be sufficient cause for revocation of the permitted area.

Section 13 - No Transplanting Seed Stock from Public Areas

No person shall transplant shellfish seed, seed stock, or stock from public fisheries within the Town of Freeport, for the purpose of stocking aquaculture permit sites without the expressed written consent of the Commission. Permittees found in violation of this section will be subject to fine and forfeiture of the permitted area.

Section 14 - Termination

Approval of any shellfish aquaculture permit shall be subject to all other applicable federal, state and municipal laws, rules and regulations as in force and amended from time to time, and at all times following such approval the permittee and the permit shall continue to comply with all such laws, rules and regulations. Failure to comply with any of the aforementioned laws, rules or regulations shall be cause to revoke the permit.

Section 15 - Coastal Waters Improvements; Migration of Navigable Channels

No permittee shall hold the Town of Freeport liable for any damage to a permit site as a result of coastal waters or harbor improvements. Any permit that is bounded by an intertidal channel, as defined by the Town, that has migrated by natural or human-made causes into or through a tideland shellfish aquaculture permit site and has eroded a portion of the permitted tideland to a depth defined as a intertidal channel, said channel will become the natural boundary of the permitted area and supersede any previously established boundaries of the permit. The permittee shall sacrifice any and all rights of the permittee's permit within the defined intertidal channel.

Section 16 - Inspection

The Marine Resource Conservation Officer (MRCO) and/or the MRCO's assistants (AMRCO) shall have the authority to inspect the permitted area, including related watercraft, vehicles, equipment and containers, under the same provisions as those set forth in 12 M.R.S.A. § 6306.