



The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Department of Public Health
250 Washington Street, Boston, MA 02108-4619

2007 FEB 15 PM 2:52
DEVAL D. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LIEUTENANT GOVERNOR

JUDYANN BIGBY, MD
SECRETARY

PAUL J. COTE, JR.
COMMISSIONER

Office of the General Counsel
Second Floor (617) 624-5220

February 15, 2007

Mr. Jack Terrill
New Bedford Harbor NRD Trustee Coordinator
NOAA - New England Region Management Division
One Blackburn Drive
Gloucester, MA 01930

Dear Mr. Terrill:

The Massachusetts Department of Public Health (MDPH), Center for Environmental Health (CEH), in coordination with the Massachusetts Department of Environmental Protection (MDEP), has been asked to review the 2005 Shellfish Restoration Statement of Work and Budget prepared by the Regional Shellfish Restoration Committee on behalf of the Towns of Dartmouth and Fairhaven and the City of New Bedford. The proposed regional shellfish restoration work in New Bedford Harbor has been submitted to the New Bedford Harbor Trustee Council.

CEH staff, in consultation with the MDPH Office of General Counsel, has reviewed the proposed restoration work to determine whether the proposed restoration project might pose an unacceptable risk to public health and whether it might conflict with MDPH regulations governing the taking of fish and shellfish in New Bedford Harbor. Based upon this review and for the following reasons, MDPH does have concerns about certain parts of this restoration project.

Among the many goals of the New Bedford Area Shellfish Restoration Project, the proposal that concerns MDPH the most is the plan to relocate shellfish from Area I to Area II. These areas are defined in Section 260.005(4) of the MDPH regulations entitled *Prohibition Against Certain Fishing in New Bedford Harbor* (105 CMR 260.000). A copy of these regulations is attached.

These regulations impose restrictions on the taking of fish and/or shellfish in each of the three areas of New Bedford Harbor. This restoration project is subject to these regulatory

restrictions. Specifically, 105 CMR 260.005(1) prohibits any taking or selling of any fish (except bait fish), lobster or shellfish from Area I. The MDPH Food Protection Program considers a "taking" to be any capturing or harvesting of fish or shellfish, even for the purpose of relocating. Therefore, the relocation of shellfish from Area I to Area II would violate these regulatory restrictions.

In addition to concerns about the restoration plan violating MDPH regulations, CEH believes that the findings of the Greater New Bedford Health Effects Study (GNBHES), released in 1987, clearly demonstrated a relationship between consumption of fish caught from the closure areas and higher serum PCB levels. In New Bedford, approximately 50 percent of fish eaters who ate fish from closed areas of the harbor had serum PCB levels in the range of 9-15.5 parts per billion (ppb) compared to mean prevalence estimates in the general population of approximately 6 ppb. Since the time of our study (1984-1987), research indicates that health effects are of concern at even lower serum PCB levels (e.g., in the 2-6 ppb range) than what was known in the mid-1980s, thereby supporting great caution with respect to harvesting fish or shellfish from the closure areas.

We appreciate the opportunity to comment on this New Bedford Harbor Restoration Plan. If you have any questions regarding this letter, please contact me at 617-624-5220.

Sincerely,



James Ballin
Deputy General Counsel

Enclosure: 105 CMR 260.000

Cc: Suzanne Condon, Associate Commissioner, MDPH-CEH
✓Martha Steele, Deputy Director, MDPH-CEH

105 CMR 260.000: PROHIBITION AGAINST CERTAIN FISHING IN NEW BEDFORD HARBOR

Section

- 260.001: Findings and Purpose
 260.002: Emergency Promulgation
 260.003: Authority
 260.004: Adulterated Fish
 260.005: Taking and/or Sale of Lobsters, and Certain Fish Prohibited

260.001: Findings and Purpose

The chemical substances known as polychlorinated biphenyls (PCBs) have been discharged into the Acushnet River and are present in that river and in the New Bedford Harbor. Laboratory analyses of lobster and bottom-feeding fish caught in this area have revealed that PCBs are present in these food sources in levels that exceed the current maximum allowable levels (or "temporary tolerance") established by the Federal Food and Drug Administration under the Food and Drug Cosmetic Act, 21 U.S.C. 301, § 346. Consumption of PCBs causes diseases deemed dangerous to the public health, namely PCB intoxication and carcinogenesis. 105 CMR 260.000 are promulgated to prevent and control the incidence of such diseases among members of the general public, and to prevent the sale of adulterated food to the public.

260.002: Emergency Promulgation

PCBs settle to the floor of the body of water into which they are discharged; they may remain there for decades. Because lobsters and certain fish are bottom-feeders, they take in PCBs which remain in their bodies in unacceptably high concentrations. These food sources are currently being taken from contaminated areas (as described in 105 CMR 260.005) for primarily recreational and other noncommercial purposes and are being consumed by the public. Consumption of these food sources by humans poses an immediate and lasting threat to health. Further public consumption of these overly-contaminated food sources must be avoided by immediately preventing the taking, sale, and thereby the eating of such food sources caught in the contaminated area. Immediate adoption of 105 CMR 260.000 is necessary for the preservation of the public health; observance of the requirements of notice and public hearing, generally required under the first paragraph of M.G.L. c. 30A, § 2 prior to the promulgation of regulations, would be, in this situation, contrary to the public interest.

260.003: Authority

105 CMR 260.000 is promulgated under authority of M.G.L. c. 111, § 5 and 6, M.G.L. c. 94, § 186 and 192, M.G.L. c. 30A, § 2.

260.004: Adulterated Fish

Fish, containing levels of PCBs exceeding the maximum allowable level (or "temporary tolerance") of PCBs established by the Federal Food and Drug Administration for the edible portion of such food sources are adulterated within the meaning of M.G.L. c. 94, § 186, first paragraph under food. Such food sources caught in the contaminated area are presumed to be contaminated.

260.005: Taking and/or Sale of Lobsters and Certain Fish Prohibited

(1) No person shall take and/or sell any fish (except bait fish), lobster or shellfish from the area of New Bedford Harbor (Area I) described below:

The waters north of the Hurricane Dyke in New Bedford Harbor.

260.005: continued

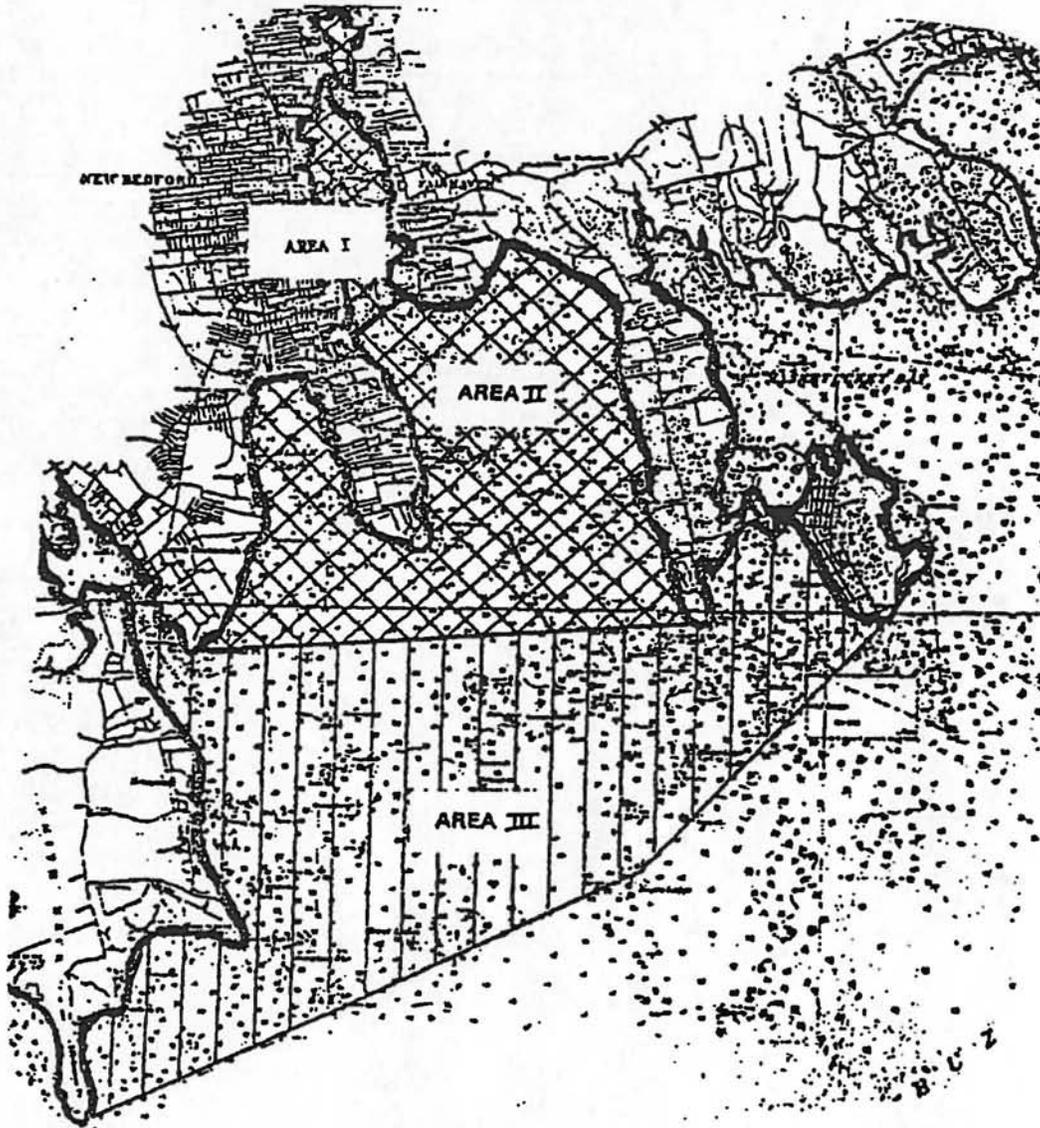
(2) No person shall take and/or sell any lobster or bottom feeding fish (including eels, scup, flounder and tautog) from the area of New Bedford Harbor (Area II) described in 105 CMR 260.005(4):

The waters generally south of area I and north of a line extending from Ricketson's Point in South Dartmouth westerly to Wilbur Point on Sciticut Neck.

(3) No person shall take and/or sell lobsters from the area of New Bedford Harbor (Area III) described in 105 CMR 260.005(4):

The waters generally south of area II and north of a line extending from Mishaum Point on Smith Neck in the town of Dartmouth north and west to Gong "3" on Hursett Rock off New Bedford Harbor and continuous north and west to Rocky Point on West Island in the town of Fairhaven.

(4) Map of New Bedford Harbor Outlining Areas I, II and III



REGULATORY AUTHORITY

105 CMR 260.000: M.G.L. c. 30A, § 2; M.G.L. c. 111, §§ 5 and 6; M.G.L. c. 94, § 186 and 192.