

March 5, 2004

William C. Walton, Ph.D.
Fisheries & Aquaculture Specialist
Barnstable County's Cape Cod Cooperative Extension & WHOI Sea Grant
PO Box 367
Barnstable, Massachusetts 02630-0367

Dear Bill,

Below is the summary of research of the Sea Grant Law Center regarding the question you posed to us about the potential liability of shellfish farmers in Massachusetts for personal injury and animal entanglement. The following information is intended as advisory research only and does not constitute legal representation of Woods Hole Oceanographic Institution Sea Grant by the National Sea Grant Law Center. It represents our interpretation of the relevant laws and cases.

In your January 15th e-mail, you presented four different liability scenarios: windsurfer injury, child injury, employee injury, and seal/turtle entanglement. Before addressing each of these scenarios in turn, a brief summary of the regulatory regime of shellfish leases in Massachusetts is provided.

Shellfish Licensing in Massachusetts

Under Chapter 130, section 57 of the Massachusetts General Laws, “the city council or mayor of any city, or the selectmen of any town, may . . . grant to any person a shellfish aquaculture license.” The Director of the Division of Marine Fisheries is required to “certify that issuance of a shellfish aquaculture license and operation thereunder will cause no substantial adverse effect on the shellfish or other natural resources of the city or town.” Once the license is granted and certified by the State, the “licensee shall have the right to the exclusive use of the lands and waters for the purposes of growing shellfish thereon.” The licensee is required to plainly mark the boundaries of the licensed area. Although the licensee has the exclusive use of the area for shellfish aquaculture, “the selectmen or city council shall permit, as a condition of the license, such public uses of said waters and lands as are compatible with the aquacultural enterprise.” With respect to damages to the shellfish and gear in the licensed area,

whoever without the consent of the licensee, unless otherwise permitted by the terms and conditions of said license: (1) takes shellfish from the licensed lands or waters or from said racks, rafts, or floats; (2) disturbs the licensed area or the growth of the shellfish thereon in anyway; (3) discharges any substance which may directly or indirectly injure the shellfish; (4) willfully injures, defaces, destroys, removes or trespasses upon said protective devices affixed directly to the tidal flats such as boxes, trays, pens, bags or nets shall be liable in tort for treble damages and costs to the licensee injured.

A licensee’s marking obligations are detailed in § 61. A licensee is required to plainly mark out “by monuments, marks or ranges and by stakes or buoys” the boundary of the licensed area. The failure of a licensee to place or properly maintain these markings is grounds for revocation of the license.

The U.S. Army Corps of Engineers also imposes requirements on shellfish aquaculture operations pursuant to its authority to regulate works and structures affecting navigation under the Rivers and Harbors Act and the discharge of dredged or fill material under Section 404 of the Clean Water Act. Shellfish licenses involving less than ten acres are covered by Massachusetts’ Programmatic General Permit (PGP) issued by

the Corps. Farmers seeking to license larger areas must apply for an individual permit from the Corps. The PGP is available at <http://www.nae.usace.army.mil/reg/mapgp.pdf>. The Corps requires that the licensed area and any elevated structures be marked in conformance with 33 C.F.R. 64, which contains the Coast Guard's rules relating to the marking of structures, sunken vessels and other obstructions for the protection of maritime navigation. The aquaculturist is also required to coordinate the proper buoy markings with the Coast Guard. No structure or device, except for buoys, may protrude more than eighteen inches above the substrate.

Scenario #1 and 2: *The windsurfer who, on an ebbing tide, falls on oyster gear and punctures a leg on a metal rod and the small child who, at low tide, runs out and around the licensed area, falls and trips over clam nets, breaking a finger.*

If a windsurfer or other recreational user is injured, the injured party most likely would sue for compensation under tort law. According to the Second Edition of Massachusetts Tort Damages § 3-1, for an injured party to recover in a tort action arising out of bodily injury, "the plaintiff must establish that she suffered bodily harm as a result of conduct for which the defendant can be held liable, such as the defendant's negligence or breach of warranty." A windsurfer could, therefore, recover for damages if the injuries caused by the aquaculture gear resulted from a defendant's negligence. In their search for a deep pocket, plaintiffs often throw the net wide to catch as many defendants as possible. Initially, a plaintiff might choose to name the shellfish farmer, the licensor, and the state as defendants in a lawsuit setting forth various grounds for liability from the negligent maintenance of the area by the shellfish farmer to the improper issuance of license by the city or township. Governmental immunity, however, will make the shellfish farmer the most attractive defendant in this type of situation.

Under the Massachusetts Tort Claims Act (MTCA), public employers are liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment. (Mass. Gen. Laws ch. 258, § 2) A public employer is defined as "the commonwealth and any county, city, town, educational collaborative, or district . . . and any department, office, commission, committee, council, board, division, bureau, institution, agency or authority thereof." (Mass. Gen. Laws ch. 258, § 1). There are ten exceptions to this rule, three of which are of particular relevance.

The MTCA is not applicable to "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary duty on the part of a public employer or public employee, acting within the scope of his office or employment, whether or not the discretion involved is abused." (Mass. Gen. Laws ch. 258, § 10(b)).

The issuance of shellfish aquaculture licenses is discretionary. The city council, mayor, or town selectmen may grant, if they choose to do so, a shellfish aquaculture license. Although the state has provided cities and towns with the authority to license tidelands for aquaculture operations, the cities and towns retain the discretion to exercise that authority. In *Walenty v. Massachusetts*, 12 Mass. L. Rep. 402 (2000), the Superior Court of Massachusetts ruled that the authority of the Commonwealth's highway department to install street lights was discretionary. Mass. Gen. Laws ch. 81, § 20A states that "the department may illuminate . . . by means of highway lighting . . . locations in the state highways wherever, in its opinion, such illumination is necessary." The Superior Court ruled that the placement of street lighting was a discretionary function and, therefore, the Commonwealth was immune from liability for injury claims based upon a failure to install highway lights. Similarly, the placement of aquaculture operations is discretionary and a city or town would be immune from liability for a claim based upon the issuance of a particular

license.

The MTCA is not applicable to “any claim based upon the issuance, denial, suspension or revocation or failure or refusal to issue, deny, suspend or revoke a permit, license, certificate, approval, order or similar authorization.” (Mass. Gen. Laws ch. 258, § 10 (e)).

Simply stated, the Commonwealth and its cities, townships, and municipalities would be immune from any claims brought for bodily injury based upon the issuance or failure to issue a shellfish aquaculture license. For example, a windsurfer would be unable to bring a cause of action against the state or a city or town in which s/he argued that the injury was caused by the improper issuance of a shellfish aquaculture license.

The MTCA is not applicable to “any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including the violent or tortuous conduct of a third person, which is not originally caused by the public employer or any other person acting on behalf of the public employer.” (Mass. Gen. Laws ch. 258, § 10(j)).

This exception is referred to as the “original source rule.” The exemption provides immunity in situations where a non-governmental source is the actual cause of the injury. For example, in an action against the Commonwealth for wrongful death due to failure to illuminate a state highway, the court found immunity under § 10(j) because the operation of a motor vehicle was the “original source” of the victim’s death. (*Walenty v. Massachusetts*, 12 Mass. L. Rep. 402 (Mass. Super. 2000)). With regard to bodily injury in a shellfish area, the “original source” of the injury to a windsurfer or swimmer would be the aquaculture gear, the private property of a third person. While the presence of this gear might create a harmful condition or situation, under § 10(j), governmental entities cannot be held liable for the failure to prevent or remedy it.

The plaintiff is, therefore, restricted to seeking compensation directly from the shellfish farmer. “Before liability for negligence can be imposed, there must first be a legal duty owed by the defendant to the plaintiff, and a breach of that duty proximately resulting in the injury.” (*McCarthy v. Town of Hamilton*, 11 Mass. L. Rep. 347 (Mass. Super. 2000)). A landowner owes a duty of care to all lawful visitors. While the shellfish farmer is not the actual owner of the tidelands where the shellfish operations are located, the licensee is granted the “exclusive use of the lands and waters” for aquaculture purposes. Because the licensee can affix structures to the substrate and exclude other shellfish farmers, the licensee has, arguably, some control over the land. “A duty of care may arise from the right to control land, even where the person held to such a duty does not own the land in question.” (*McCarthy*). A shellfish farmer, therefore, owes a duty of care to all lawful visitors to the license area.

Is a windsurfer a lawful visitor to the license area? Although the town or city granting the license is required to permit, as a condition of the license, compatible public uses, windsurfing is probably not compatible. In addition, “there is no general right in the public to pass over [tidal flats] or to use it for bathing purposes.” (*Wellfleet v. Glaze*, 403 Mass. 79, 85 (Mass. 1988)). If a windsurfer does not have the right to pass over the tidal flats where the shellfish bed is located, s/he would be considered a trespasser. In addition, the young child playing in the area during low tide may also not have a right to be in the area. Massachusetts is a low water state, which means that private property owners own the land abutting the water landward of the low water mark. “There is no public right of bathing in such a way as to make any use of the land on the seashore between high water mark and low water mark.” (*Butler v. Attorney*

General, 195 Mass. 79, 82 (Mass. 1907). A landowner does not owe a duty of care to trespassers.

Even assuming that a court would find that a shellfish farmer owed a duty to a passing windsurfer, liability will only attach if the farmer's breach of the duty of care caused the harm, i.e. the farmer was negligent. Basically, an individual's actions are negligent if he failed to exercise reasonable care. Reasonable care is generally defined as the amount of care "which a reasonable man in his position, with his information and competence, would recognize as necessary to prevent the act from creating an unreasonable risk of harm to another." (Restatement (Second) of Torts § 298 (1965)). As long as a shellfish farmer adheres to the marking guidelines established by the state and the Coast Guard, a finding of liability is unlikely. By marking the area with buoys and flags the farmer has taken reasonable steps to warn visitors about the conditions in the area. Windsurfers and other users of the coastal waters should be aware that these types of marked areas are off-limits.

Furthermore, it can be argued that these shellfish operations are open and obvious dangers. The Supreme Court of Massachusetts has stated that a landowner has no duty of care with regard to a risk that is open and obvious to a person of average intelligence. In *O'Sullivan v. Shaw*, the court ruled that diving into the shallow end of a pool is an open and obvious risk and the pool owner did not have a duty to warn the victim about the danger. (726 N.E.2d 951 (Mass. 2000)). If the area is well marked and the rafts and other structures are visible to the casual observer, at least at low tide, the dangers of windsurfing and playing in the area should be obvious.

Scenario #3: *The paid employee who slices her hand on juvenile oysters and needs stitches.*

In general, an employer is required to compensate employees for injuries "arising out of" and "in the course of" employment. For an employer to be liable there must be a significant nexus between the job and the injury and an employer/employee relationship. An employer is usually someone who has the right to control the means and ends of the work detail, has hiring/firing authority, pays salary/wages, receives the benefit of the person's work, and is responsible for the working conditions. (Labor and Employment Law § 267.02 (2003)). In Massachusetts, an employee is entitled to compensation from his/her employer for "personal injury arising out of and in the course of his employment." (Mass. Gen. Laws ch. 152, § 26). All private sector employers, even those with only one employee, are required by law to purchase insurance or qualify as self-insurers. An "employee" is "every person in the service of another under any contract of hire, express or implied, oral or written." (Mass. Gen. Laws ch 152, § 1(4)). Independent contractors are not considered employees and coverage is elective for seasonal or casual workers. In some situations, because of employee misconduct, intoxication, or horseplay, an employer need not compensate the employee. In sum, a shellfish farmer would be required to compensate his/her employee for injuries suffered on the job, unless the employee was a seasonal worker and the farmer had elected not to provide coverage.

Scenario #4: *The juvenile seal or sea turtle that becomes entangled in gear and drowns.*

Under the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA) it is illegal for any person to "take" a listed endangered or threatened species or a marine mammal. The ESA defines take as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." (16 U.S.C. § 1532(19)). Under the MMPA, take is defined as "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." (16 U.S.C. § 1362). Under the ESA, the penalties for knowingly violating the act can be severe. Civil penalties up to \$25,000 and criminal penalties up to \$50,000 and one year imprisonment may be imposed for knowing violations. However, the maximum penalty for an unknowing violation is \$500. Under the MMPA, civil penalties can be assessed up to \$10,000 for each violation, but criminal penalties may only be imposed for "knowingly violating" the

Act. A defendant “is said to act knowingly if he is aware ‘that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.’” (*U.S. v. Bailey*, 444 U.S. 394, 404 (U.S. 1980)). The Supreme Court explained this distinction as follows:

It is quite possible to take protected wildlife purposefully without doing so knowingly. A requirement that a violation be “knowing” means that the defendant must “know the facts that make his conduct illegal,” *Staples v. United States*, 511 U.S. 600, 606, 128 L. Ed. 2d 608, 114 S. Ct. 1793 (1994). The hunter who shoots an elk in the mistaken belief that it is a mule deer has not knowingly violated § 1538(a)(1)(B)—not because he does not know that elk are legally protected (that would be knowledge of the law, which is not a requirement, see ante, at 696-697, n. 9), but because he does not know what sort of animal he is shooting. The hunter has nonetheless committed a purposeful taking of protected wildlife, and would therefore be subject to the (lower) strict-liability penalties for the violation. (*Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 722 (U.S. 1995)).

First, it is questionable whether the death or injury of a protected species due to entanglement in the gear would even be considered a “take.” Under the ESA and the MMPA it is unlawful for any person to “take” a protected species. Even though the farmer placed the gear in the water, there has been no affirmative action directed towards a particular animal which caused its death or injury. The Supreme Court suggested in *Babbitt v. Sweet Home* that a violation of the ESA required an act directed “intentionally against a particular animal.” This, however, is far from settled law as other courts have required much less intent. For example, the Ninth Circuit held a railroad company liable for bear fatalities that occurred as a result of a grain spillage which attracted bears to a railroad track where some were hit and killed. (*See National Wildlife Federation v. Burlington Northern Railroad*, 23 F.3d 1508 (9th Cir. 1994)). Under the standard in *National Wildlife Federation*, a shellfish farmer could be held liable for deaths which occur as a result of a protected species being attracted to the shellfish gear.

Even if there is a take, a shellfish farmer should be able to argue that there has not been a “knowing” violation of the ESA or the MMPA, thereby preventing the imposition of the severe civil and criminal penalties. In order to impose the high penalties, the government would have to prove that the shellfish farmer knew that a protected species would be killed or injured through the placement of the gear in the water. This would be a hard case to win. Before a shellfish aquaculture license may be issued by the municipality, the Massachusetts Division of Marine Fisheries is required to certify that the operation of the shellfish project will not have an adverse impact on the shellfish or other natural resources. While the issuance of a permit by the state will not shield a licensee from liability under the ESA or the MMPA, when a state or a municipality has the authority to permit certain activities, such as fishing, the governmental entity does assume the responsibility for ensuring that the activity does not “take” federally protected species. (*See Strahan v. Cox*, 127 F.3d 155 (1st Cir. 1997); *Loggerhead Turtle v. County Council*, 896 F. Supp. 1170 (M.D. Fla. 1995)). If the state certifies the project, a shellfish farmer would be operating under the assumption that adverse impacts, including marine mammal entanglements, are not expected. The government would have difficulty arguing that a licensee operating under a validly issued license knew that the gear would cause the death or injury of a protected species.

For licensees who are concerned about entanglements, the MMPA authorizes the use of deterrence measures, so long as the deterrence measures do not result in the death or serious injury in marine mammals. In 1994, Congress amended the MMPA to allow fishermen to take measures to deter marine mammals from damaging fishing gear or the catch, private property owners to deter marine mammals from damaging private property, and individuals to deter marine mammal from endangering personal safety. (16

U.S.C. § 1371(a)(4)). Section 1371(a)(4) directed NOAA Fisheries to develop and issue guidelines for the safe use of deterrence measures. Unfortunately, NOAA Fisheries has yet to publish these guidelines. The agency did, however, issue proposed guidelines in 1995. (60 Fed. Reg. 22,345 (May 5, 1995)). A final rule has not been issued. Anyone interested in using deterrence measures should contact NOAA Fisheries' Office of Protected Resources for up-to-date information on permissible methods.

Overall, adherence to the marking guidelines and other conditions of the license should protect a shellfish farmer from personal injury claims. Although the shellfish operations could result in the "take" of a marine mammal or an endangered species, farmers would probably only be penalized for egregious violations. I hope you find the above information useful and that it eases some of your concerns. Please let me know if you have additional questions.

Sincerely,

Stephanie Showalter
Director