The Commission will consider regulations to require dyeing of all commercially harvested clams/mussels for bait (i.e. nonhuman consumption) and some housekeeping adjustment to shellfish regulations.

1. Agenda Item Summary
2. Hearing Notice and Fiscal Impact Statement
3. Staff Report
4. Letter of Notice to Shellfish Harvesters
5. Draft Administrative Rules
6. Public Correspondence

ORS 506.109, 506.119, 506.129
OAR Chapter 635, Division 005
Agenda Item Summary

BACKGROUND

The Oregon Department of Agriculture (ODA) is responsible for insuring health and sanitary conditions in the harvest and distribution of commercial shellfish in Oregon. However, ODA does not have authority over shellfish harvested for nonhuman consumption purposes (i.e. bait) and has relied on ODFW to establish standards for these shellfish. ODA and Oregon State Police (OSP) have requested ODFW require the dyeing of all bait clams/mussels regardless of the harvest area.

Staff is also recommending some housekeeping adjustments to shellfish OARs.

PUBLIC INVOLVEMENT

- ODFW staff met with OSP and ODA officials to discuss issues and draft new dyeing procedures.
- A letter outlining issues along with a draft of new regulations was sent to all clam/mussel permit holders (approx. 230). (Attachment 4)

ISSUE 1

| Require dyeing of all nonhuman consumption clams/mussels |

ANALYSIS

Currently regulations require dyeing of clams taken only from restricted areas (closed to human consumption by ODA). Under shellfish sanitation guidelines, proper handling and storage procedures are as important as ensuring the harvest area is clean. Clams and mussels taken from "open" areas, but not in accordance with sanitary handling and storage procedures are causing an enforcement problem for OSP who cannot distinguish between clams/mussels harvested for bait and clams/mussels harvested for human consumption. Illegal sales of bait clams/mussels to retailers could jeopardize ODA's authority to permit interstate shipping from all Oregon shellfish growing areas. On several reviews of Oregon's shellfish sanitation program, the US Food and Drug Administration has strongly recommended all bait shellfish be dyed.

OPTIONS

1. Require dyeing of all commercially harvested clams/mussels for bait (i.e. nonhuman consumption).
2. Make no change

STAFF RECOMMENDATION

Option 1.

ISSUE 2

| Housekeeping adjustments to shellfish OARs |

ANALYSIS

- The responsibility of the shellfish sanitation program moved from the Oregon State Health Division to the Oregon Department of Agriculture in 1993. OARs have not been adjusted to reflect this change.
- Commercial harvesting was inadvertently left out of the 1993 revision to regulations closing areas for recreational harvesting due to biotoxin
concerns.
- In December 2001, the Commission approved an "incidental take" of
gaper clams during the regular closed season of January through June,
under a Developmental Fisheries Permit. At the time, we neglected to
change an associated regulation in a different chapter to reflect that
decision.
- The OARs also contain an old address for the ODFW office in
Newport that needs to be updated.

OPTIONS
1. Approve housekeeping adjustments to shellfish OARs.
2. Make no change

STAFF
Option 1.

RECOMMENDATION

| DRAFT MOTION | I move to amend OAR Division 005 as proposed by staff to require the dyeing of all commercially harvested bait clams or mussels and to make the proposed housekeeping adjustments to the shellfish regulations. |
| EFFECTIVE DATE | Upon filing. |
**NOTICE OF PROPOSED RULEMAKING HEARING**

A Statement of Need and Fiscal Impact accompanies this form.

<table>
<thead>
<tr>
<th>Oregon Department of Fish and Wildlife (ODFW) - Fish Division</th>
<th>Administrative Rules Chapter Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mike Lueck</td>
<td>(503) 872-5272, Ext. 5447</td>
</tr>
</tbody>
</table>

**Rules Coordinator**

2501 SW First Avenue; P. O. Box 59; Portland, OR 97207

**Address**

<table>
<thead>
<tr>
<th>Hearing Date</th>
<th>Time</th>
<th>Location</th>
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<tbody>
<tr>
<td>6/07/02</td>
<td>8:00 a.m.</td>
<td>Portland, OR</td>
</tr>
</tbody>
</table>

**Fish and Wildlife Commission**

**Hearings Officer**

**RULEMAKING ACTION**

**ADOPT:**

Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

**AMEND:** OAR Chapter 635, Division 005

**REPEAL:**

Renumber: Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

Amend and Renumber: Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

**Stat. Auth.:** ORS 506.109 and 506.119

**Other Authority**

**Stats. Implemented:** ORS 506.129

**RULE SUMMARY**

Amend rules regarding the commercial shellfish fishery.

**6-7-02**

**Last Day for Public Comment**

**Authorized Signer and Date**

Sharon M. Bird

*The Oregon Bulletin is published on the 1st of each month and updates the rule text found in the Oregon Administrative Rules Compilation. Notice forms must be submitted to the Administrative Rules Unit, Oregon State Archives, 800 Summer Street NE, Salem, Oregon 97310 by 5:00 pm on the 15th day of the preceding month unless this deadline falls on a Saturday, Sunday or legal holiday when Notice forms are accepted until 5:00 pm on the preceding workday.*
Secretary of State

STATEMENT OF NEED AND FISCAL IMPACT
A Notice of Proposed Rulemaking Hearing or a Notice of Proposed Rulemaking accompanies this form.

Oregon Department of Fish and Wildlife - Fish Division

In the Matter of amendment of OAR Chapter 635, Division 005 relating to Commercial Shellfish Fisheries

Statutory Authority, Statutes Implemented, Statement of Need, Principal Documents Relied Upon, Statement of Fiscal Impact

Statutory Authority: ORS 506.109 and 506.119

Other Authority: Statutes Implemented: ORS 506.129

Need for the Rule(s):

The rules are needed to amend regulations to require dyeing of all commercially harvested clams and mussels of nonhuman consumption quality (i.e. bait quality).

Documents Relied Upon:

Staff report for Oregon Fish and Wildlife Commission Meeting of June 7, 2002

The above documents are available for public inspection in the Department of Fish and Wildlife, Fish Division, Third Floor, 2501 SW First Avenue, Portland, Oregon, between 8:00 a.m. and 4:30 p.m., on normal working days, Monday through Friday.

Fiscal and Economic Impact:

Please see attached.

Administrative Rule Advisory Committee consulted?: No

If not, why?: Oregon Department of Agriculture and Oregon State Police requested rule changes to more effectively enforce shellfish sanitation regulations.

Authorized Signer and Date

Sharon M. Bird

Administrative Rules Unit, Archives Division, Secretary of State, 800 Summer Street NE, Salem, Oregon 97310.
Fiscal and Economic Impact Statement for the June 7, 2002 Hearing in the Matter of Rules Relating to Commercial Shellfish Fisheries

Fiscal and economic impact: The proposed rules will affect state agencies, units of local government and the public, respectively, as discussed below. Oregon Department of Fish and Wildlife staff is recommending the Commission adopt amendments to the rules regarding dyeing of clams of non-human consumption quality. Staff is proposing to require dyeing of all commercially harvested clams of non-human consumption quality (i.e. bait quality) regardless of the harvest area. Currently, dyeing is required only for harvests in areas restricted or closed by the Oregon Department of Agriculture (ODA).

The ODA is responsible for insuring sanitary conditions in the harvest and distribution of commercial shellfish for human consumption. Harvesters taking clams/mussels for human consumption must be licensed by ODA, and follow specific handling and storage requirements to insure the safety of shellfish for the human consumption market. However, ODA does not have authority over shellfish harvested for non-human consumption purposes and relies on ODFW to establish standards for these shellfish.

Also, the Oregon State Police (OSP) is finding it difficult to enforce the licensing and handling requirements for clams/mussels harvested for bait versus clams/mussels harvested for human consumption when those shellfish are taken from open areas. Illegal sales of bait quality clams/mussels to retailer could jeopardize ODA's authority to permit interstate shipping from all shellfish growing areas. On several reviews of Oregon's shellfish sanitation program, the U.S. Food and Drug Administration has recommended all bait shellfish be dyed.

A. State agencies which could be affected by adoption of these rules are the Oregon Department of Fish and Wildlife (ODFW), the Oregon Department of Agriculture (ODA) and the Oregon State Police (OSP). No significant changes from the current levels of the departments' operations or expenditures are expected as a result of the adoption of these rules. In order to more efficiently and effectively enforce shellfish sanitation regulations, OSP and ODA have requested ODFW require the dyeing of all bait quality clams/mussels regardless of the harvest area. OSP and ODA would find it easier and perhaps less costly to enforce shellfish license/handling requirements if the rules are adopted.

B. No units of local government are expected to be affected by these rules. No significant changes from the current levels of any local agencies' operations or expenditures are expected as a result of the adoption of these rules.

C. The public could be affected by the adoption of these rules: A requirement to dye all clams/mussels when not taken/handled for human consumption quality (regardless of where they were harvested) would be an effective enforcement tool for the protection of public health, and the maintenance of interstate markets for shellfish harvested in Oregon.

We have no explicit information on the cost of complying with the proposed requirement to dye shellfish of bait quality, but believe it is relatively low. Some additional labor would be needed compared to the current situation.

Some additional changes are needed to correct some minor technical errors in the administrative rules. These changes are of a "housekeeping" nature and would have no fiscal or economic impacts.

The rules are believed to be fully compatible with legislative direction on the goals of wildlife management in Oregon.

Most businesses affected by these rules are believed to be "small business."
I. Introduction

For the hearing scheduled on June 7, 2002, staff is proposing for Commission consideration a recommendation to require dyeing of all commercially harvested clams for bait (i.e. nonhuman consumption) regardless of the harvest area. Some housekeeping adjustments to the OARs are also proposed.

II. Staff Analysis of Issues and Options - Recommendations

The following discusses staff recommendations. The full text of proposed rule changes is attached beginning on Page 4.

- Issue 1. Require dyeing of all nonhuman consumption clams/mussels.

**Issue 1**

The Oregon Department of Agriculture (ODA) is responsible for insuring health and sanitary conditions in the harvest and distribution of commercial shellfish for human consumption. Harvesters taking razor clams, bay clams, or mussels for human consumption must be licensed by ODA and follow specific handling and storage requirements to insure the safety of shellfish for the human consumption market. However, ODA does not have authority over shellfish harvested for nonhuman consumption purposes (i.e. bait) and has relied on ODFW to establish standards for these shellfish.

In 1985, ODFW adopted a regulation requiring dyeing of clams/mussels taken for bait purposes from areas restricted or closed by the ODA (then the Oregon Health Division) for human consumption purposes. Clams/mussels taken for bait purposes from open areas (not restricted or closed by ODA) did not need to be dyed. Harvesters taking clams/mussels for purposes other than human consumption, "bait harvesters" are not informed by ODA of area restrictions and proper handling and storage of shellfish for human consumption. Under shellfish sanitation guidelines, following proper handling and storage procedures is as important as ensuring the harvest area is clean. Oregon State Police (OSP) is finding it difficult to enforce the licensing/handling requirements between clams/mussels harvested for bait and clams/mussels harvested for human consumption when taken from open areas. Illegal sales of bait clams/mussels to retailers could jeopardize ODA's authority to permit interstate shipping from all Oregon shellfish growing areas. On
several reviews of Oregon's shellfish sanitation program, the US Food and Drug Administration has strongly recommended all bait shellfish be dyed. A requirement to dye all clams/mussels when not taken/handled for human consumption (regardless of where they were harvested) would be an effective enforcement tool for the protection of public health.

Option A: (preferred) Staff recommends the Commission adopt rules to require dyeing of all commercially harvested clams/mussels for bait (i.e. nonhuman consumption).

Option B: No action: status quo, bait clams/mussels from open areas would not be dyed.

Issue 2

Housekeeping adjustments to shellfish OARs.

In 1993, the Legislature moved the responsibility of the shellfish sanitation program from the Oregon State Health Division to the Oregon Department of Agriculture. Our OARs have not been adjusted to reflect this change.

Also in 1993, ODFW adopted a regulation closing recreational fishing areas whenever ODA issued a health advisory because of a biotoxin concern. At the time, the concern was with recreational harvesting and commercial harvesting was inadvertently left out of the regulation. This has created an inconsistency where areas are closed to recreational harvest because the clam/mussels are unsafe, yet, commercial harvest can occur. If there are biotoxin concerns, an area should be closed to all harvesting.

In December 2001, the Commission approved an "incidental take" of gaper clams during the regular closed season of January through June, under a Developmental Fisheries Permit. At the time, we neglected to change an associated regulation in a different chapter to reflect that decision.

The OARs also contain an old address for the ODFW office in Newport that needs to be updated.

Option A: (preferred) Staff recommends the Commission adjust rules to reflect the change in jurisdiction from Oregon State Health Division to the Oregon Department of Agriculture, to close areas for all harvesting for biotoxin concerns, adjust the gaper season regulation to reflect the Commission decision in December, and change in the address of the ODFW office in Newport.

Option B: No action: status quo references to Oregon State Health Division would and address of Newport office would remain incorrect, commercial harvest of shellfish could occur in areas with biotoxin concerns, OARs on gaper clam season would be inconsistent.
To commercial clam/mussel harvesters:

The Fish and Wildlife Commission will meet on June 7 to consider changes to the clam/mussel regulations concerning dyeing for bait that would take effect July 1, 2002, if approved. Under current regulations, only shellfish harvested from areas closed for human consumption by the Oregon Dept. of Agriculture (ODA) need to be dyed. However, Oregon State Police is finding it difficult to enforce the licensing/handling requirements between shellfish harvested for bait and shellfish harvest for human consumption when both can be taken from open areas. Under shellfish sanitation guidelines, following proper handling and storage procedures is just as important as ensuring the harvest area is clean. Illegal sales of bait quality shellfish to retailers could jeopardize ODA’s authority to permit interstate shipping from all shellfish growing areas. On several reviews of Oregon’s shellfish sanitation program, the US Food and Drug Administration has strongly recommended all bait shellfish be dyed.

The proposed regulations would require dying of all clams/mussels if licensing, handling, and storage procedures required by the ODA for human consumption quality are not followed, regardless of where the shellfish are harvested. For example, you will need to dye clam/mussels if they are:

- taken from an area closed for human consumption; or
- taken for bait from an area open for human consumption.

All clams/mussels that are not handled for human consumption quality will need to be dyed.

In addition, there would be no commercial harvest of shellfish for any purpose if the ODA closes an area because of a biotoxin concern.

Enclosed is a draft of the proposed regulations the Fish and Wildlife Commission will be considering at their meeting on June 7 (there may be some modifications before the final version is adopted). The meeting will be held in Portland at the ODFW headquarters office (2501 W First Ave), Commission Meeting Room, beginning at 8 am. You are welcome to provide verbal testimony at the hearing or send written comments ahead of time (PO Box 59, Portland 97207). If you have any questions, feel free to contact us.

Sincerely,

Jean McCrae
Fish & Wildlife Biologist
Newport (541-867-4741)

Matt Hunter
Fish & Wildlife Biologist
Astoria (503-325-2462)

CC: ODA (Cannon)
OSP (Seaholm, Scroup, Cleary)
DEPARTMENT OF FISH AND WILDLIFE

DIVISION 5
COMMERCIAL SHELLFISH FISHERY

General

635-005-0001
Clams and Mussels from Health Closure Areas

(1) As used in this section:
(a) "bait quality" means clams or mussels not harvested in accordance with licensing, handling, and storage procedures required by the Oregon Department of Agriculture for human consumption purposes. Any clams or mussels taken from a restricted area will be considered bait quality. Bait quality clams or mussels may not be sold for human consumption purposes.
(b) "human consumption quality" means clams or mussels harvested in accordance with licensing, handling, and storage procedures required by the Oregon Department of Agriculture for human consumption purposes. Human consumption quality clams/mussels may be taken only from areas approved by the Oregon Department of Agriculture.
(c) "restricted area" means an area closed or prohibited by the Oregon Department of Agriculture for the harvest of clams or mussels for human consumption quality.
(d) "open area" means an area approved by the Oregon Department of Agriculture for the harvest of clams or mussels for human consumption quality.

(2) It is unlawful to take clams or mussels for any commercial purpose from an area closed by a Public Health Advisory for biotoxin concerns.

(3[4]) It is unlawful without prior authorization from the Oregon [State Health Division] Department of Agriculture for any person to sell shellfish [for] as human consumption quality taken from an area designated as restricted or closed by the Oregon [State Health Division] Department of Agriculture.

(4[2]) Clams and mussels taken as bait quality from any open area or an area designated as restricted [or closed] by Oregon [State Health Division] Department of Agriculture may be sold [for bait], provided:
(a) They are visibly dyed with an ODFW [Department] approved dye;
(b) Dyeing must occur before leaving the [restricted or closed] harvest area or before the time of docking of the vessel used in harvesting;
(c) Clams and mussels taken [from restricted or closed areas] for bait quality may not be possessed aboard a vessel while clams and mussels [from unrestricted areas] for human consumption quality are on board. Upon leaving the vessel or the digging area, clams and mussels [from restricted or closed areas] as bait quality may not be mixed with clams and mussels [from unrestricted areas] taken for human consumption quality. If any clams/mussels aboard a vessel are of bait quality, it will be presumed that all clams/mussels aboard the vessels will be of bait quality [any clams on board a vessel fishing in a restricted or closed area have been harvested in the restricted or closed area];
(d) Prior to sale, clams or mussels taken from restricted [or closed] areas and live boxed must be stored in a restricted [or closed] area pending sale.
(g) "shellfish sanitation certificate" means a license required by Oregon Department of Agriculture to engage in business of harvesting shellfish for human consumption;

(2) It is unlawful to take clams or mussels for any commercial purpose from a health closure area closed for biotoxins.

([1]) It is unlawful [without prior authorization from the Oregon State Health Division] for any person to sell shellfish for human consumption:

(a) taken from an area designated as restricted [or closed] by the Oregon [State Health Division] Department of Agriculture; or

(b) taken without a shellfish sanitation certificate from the Oregon Department of Agriculture.

(2) Clams and mussels taken as bait must be [from an area designated as restricted or closed by the Oregon State Health Division] may be sold for bait, provided:

(a) They are visibly dyed with a Department of Fish and Wildlife-approved dye;

([b]) Dyeing must occur before leaving the [restricted or closed] harvest area, before being transported by vehicle, or before the time of docking of the vessel used in harvesting;

([c]) Clams and mussels taken [from restricted or closed areas for bait] may not be possessed aboard a vessel while clams and mussels [from unrestricted areas for human consumption] are on board. Upon leaving the vessel or the [digging] harvest area, clams and mussels taken [from...
restricted or closed areas [as bait] may not be mixed with clams and mussels [from unrestricted areas] taken for human consumption. [It will be presumed that any clams on board a vessel fishing in a restricted or closed area have been harvested in the restricted or closed area];

[(d)] Prior to sale, clams or mussels taken from restricted [or closed] areas and live boxed must be stored in a restricted [or closed] area pending sale.

(d) Clams or mussels taken for human consumption and later sold as bait must be dyed at the time of sale to a bait dealer.

Stat. Auth.: ORS 506.109, 506.119 and 506.129
Stats. Implemented: ORS 506.129
Hist.: Adopted 6-7-02, ef. upon filing

635-005-0003

Additional License Requirement

Each harvester and shucker (person cleaning clams or mussels prior to sale) of shellfish for human consumption must obtain a shellfish sanitation certificate from the Oregon Department of Agriculture. (ORS 622.080).

Stat. Auth.: ORS 506.109, 506.119 and 506.129
Stats. Implemented: ORS 506.129
Hist.: Adopted 6-7-02, ef. upon filing

635-005-0016

Permit and Logbook Required

(1) It is unlawful:
(a) To take clams for commercial purposes without first obtaining a permit from the Department of Fish and Wildlife;
(b) To take clams except under the terms and conditions specified in the permit. Permits may be issued to mechanically harvest clams in subtidal areas by means of water jet or other hand or handpowered tool. Application for such a permit must be written and include a description of the specific areas where mechanical taking is proposed and such other information as the Director shall require.

(2) Applications should be mailed to: Marine Regional Office, Department of Fish and Wildlife, 2040 SE Marine Science Drive, [Building No. 3, ] Newport, OR 97365.

Stat. Auth.: ORS 506.109, 506.119
Stats. Implemented: ORS 506.129
Hist.: Adopted 6-7-02, ef. upon filing

635-005-0020

Closed Seasons and Areas

It is unlawful to take for commercial purposes:

(1) Gaper clams from January 1 through June 30,
except as authorized under a Developmental Fisheries Permit (OAR 635-005-0900).

(2) Razor clams from July 15 through September 30 in the area north of Tillamook Head in Clatsop County.

(3) Any clams from:
(a) Little Nestucca Bay;
(b) Big Nestucca Bay;
(c) Netarts Bay, except cockles may be taken;
(d) Salmon River and Bay;
(e) Siletz River and Bay;
(f) All state parks south of Tillamook Head.

Stat. Auth.: ORS 506.109, 506.119
Stats. Implemented: ORS 506.129
Hist.: Adopted 6-7-02, ef. upon filing
Additional License Requirement

The Oregon State Health Division requires a certificate of shellfish sanitation as a harvester from any individual taking clams for commercial purposes and a certificate of shellfish sanitation as a shucker from any individual cleaning clams prior to sale (ORS 622.080).

Hist.: Repealed 6-7-02, ef. upon filing.