

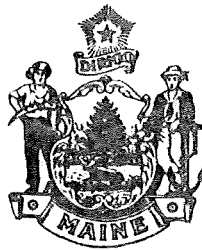
MAINE STATE LEGISLATURE

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JAMES E. TIERNEY
ATTORNEY GENERAL



STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

July 9, 1981

The Honorable Joseph E. Brennan
Governor of Maine
State House
Augusta, Maine 04333

Dear Joe,

You have requested the opinion of this office with respect to the proper interpretation of 12 M.R.S.A. § 6701 as it applies to the licensing of persons engaged in scalloping activities inside and outside of Maine territorial waters who utilize docking facilities at Maine ports. I am unable to provide a definitive response to your question. The ambiguity of Section 6701 and its near-silent legislative history make such precise statutory interpretation impossible. Consequently, rather than hazard what would be no more than a guess at its proper interpretation in the circumstances you outline, I would suggest that remedial legislation be introduced at the next legislative session in order to eliminate the statute's ambiguity, as well as to address modern developments within the scallop industry that have occurred since its original enactment.

STATUTORY HISTORY

The Maine Legislature first enacted a scallop license statute in the 1947 revision of the Sea and Shore Fisheries Laws (P.L. 1947, c. 332, § 109), codified at R.S. c. 34 § 109. The statute provided:

Sec. 109. Scallop fishing license provided for. No person shall fish for or take in any manner for commercial purposes any scallops without first having procured from the commissioner a written license therefor.

A license, designated as a scallop fishing license, shall be issued upon payment of a fee of \$5 and shall entitle the holder to take scallops for commercial purposes at times and

in places permitted by law. The holder of a scallop fishing license shall not be required to procure a resident commercial fishing license, but shall be entitled to all privileges of the same by virtue of such scallop fishing license.

It will quickly be seen that this original license statute regulated only the actual harvesting of scallops inside Maine waters, and did not regulate the possession, shipping, transporting or selling of scallops. In addition, no attempt was made to define "license holder" as the statute simply provided that anyone fishing for scallops must be licensed.

In 1951^{1/}, however, the Legislature began to distinguish between license holders and unlicensed crew members when it repealed the original statute and replaced it with P.L. 1951, c. 151, codified at R.S. c. 34, § 109. This statute provided as follows:

Scallop fishing license. The operator of a boat engaged in the taking of scallops for commercial purposes shall first procure from the commissioner a written license therefor.

Such a license, designated as a scallop fishing license, may be issued to any person who has been for three years prior to the date of his application a legal resident of the state and shall entitle the holder to take scallops for commercial purposes at times and in places permitted by law.

The fee for a scallop license shall be \$10 for the operator of the boat and a crew of 1 man; \$12.50 for the operator of the boat and a crew of 2 men; and \$15 for the operator of the boat and a crew of 3 or more men.

By virtue of such scallop license, no crewman shall be required to have any other license issued under the provisions of this chapter.

The statute thus drew a clear distinction between vessel operators (who must have licenses) and crew members (who need not) in the license fee provisions of the Act. There is no further explanation, however, of the distinction in the Act's legislative history. It

^{1/} In 1949, the scallop licensing statute was amended to include a 3 year residency requirement for license holders. P.L. 1949, c. 415, § 15.

was unaccompanied by a Statement of Fact and the subject of no debate in the Legislative Record. 2/

In 1953, the scallop license law was again repealed and replaced in a Biennial Revision of the Sea and Shore Fisheries Laws. 3/ That statute provided:

No person, as owner or operator, shall operate in coastal waters any boat or drag engaged in the taking of scallops for commercial purposes until he has procured from the commissioner a written license therefor.

Such a license, designated as a scallop fishing license, may be issued to a person who has been 1 year prior to the date of his application a resident of the state and shall entitle the holder to take scallops for commercial purposes at times and in places permitted by law.

The fee for such scallop fishing license shall be \$10 for each such boat, provided that if the crew of the boat exceeds 3 men, including the operator, the fee for this license shall be \$10 for each such boat and \$3 for each resident member of the crew in excess of 3 men.

All persons assisting or helping in attending fishing gear or operating the boat shall be considered members of the crew, and if such boat so licensed is found on inspection to have more crew members than is stated in the license, the operator of the boat shall be punished by a fine of \$25 for each such unauthorized person, or by imprisonment for no more than 30 days.

The range of persons who may hold licenses was thus expanded to include owners as well as operators, meaning that, for the first time, it was not necessary for a scallop vessel to have a license actually on board. However, the statute made clear that the operator was still responsible for the vessel's compliance with its provisions relating to license fees.

2/ See L.D. 1951, No. 1256. Although L.D. 1951, No. 1256 was the replacement for L.D. 1951, No. 699, "AN ACT Relating to Scallop Fishing," the provisions differed only in requiring that crew members of the vessel possess a commercial fishing license, a lobster and crab fishing license or a commercial shellfish license, in addition to the vessel operator's scallop license, in order to authorize scalloping activities by crew members.

3/ P.L. 1953, c. 129 §14, codified at R.S., c. 34, § 109. L.D. 1953, No. 147 does not contain a Statement of Fact nor does any explanation of the bill appear in the 1953 Legislative Record.

The next substantive revision^{4/} to the scalloping license statute appeared in 1959 when the statute was recodified to appear at R.S. 37-A, & 59.5^{5/} The 1959 statute continued to restrict scallop licenses to residents of Maine, but no longer expressly referred to the owner or operator of the vessel as the potential licensees. However, it is reasonable to construe the 1959 statute as continuing to authorize owners as well as operators to be eligible for licenses. That operators may hold licenses is made clear in the following provision:

It is unlawful for any person to operate in the coastal waters of the State any boat engaged in the taking of scallops unless he has a current written license from the commissioner as provided in this section. (emphasis added).

In addition to this position, the statute also contained a new provision which permitted a resident of Maine obtain a scallop license for "any number of boats" engaged in taking scallops.^{6/} While at first glance the statute seems to contain contradictory provisions in requiring that the actual operator be licensed, while at the same time permitting a resident to license an unlimited number of boats, this discrepancy may be resolved if the statute is read to allow the license holder to be either the owner (possibly of many vessels) or the actual operator (necessarily of only one vessel).

The final relevant revision^{7/} to the scallop license statute occurred in the 1977 recodification of the marine resources law, when the Legislature enacted the current statute, 12 M.R.S.A. § 6701, which provides as follows:

§ 6701. Scallop license

1. License required. It shall be unlawful for any person to engage in the activities authorized by this license under this section without a current scallop license or other license issued under this Part authorizing the activities.

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- ^{4/} In the intervening years, the scallop license statute reappeared as R.S. 1954, c. 38, § 106, but no substantive changes occurred.
- ^{5/} L.D. 1959, No. 255 does not contain a Statement of Fact nor does the 1959 Legislative Record explain this change in the license law.
- ^{6/} R.S., c. 37-A, § 59 (IV).
- ^{7/} Although the scallop license statute was amended by P.L. 1975, c. 565 § 8, P.L. 1975, c. 743 § 4, and P.L. 1979, c. 127, § 86, these revisions are not relevant to the present issue.

2. Licensed activity. The holder of a scallop license may fish for or take scallops or possess, ship, transport or sell scallops he has taken. The license shall also authorize crew members aboard the licensee's boat when it is engaged in dragging for scallops to undertake these activities.

3. Eligibility. A scallop license shall only be issued to an individual and shall be a resident license.

4. Exception. In any one day, any person may take or possess not more than 2 bushels of shell scallops or 4 quarts of shucked scallops for personal use without a scallop license.

5. Fee. The fee for a scallop license shall be \$25.

Regarding the key question of who may hold a scallop license, the revision was obscure. It eliminated any reference to "owners" or "operators," which had been present in predecessor statutes since 1953. In place of such terms, the revisions merely stated that a "license shall also authorize crew members aboard the licensee's boat" to engage in scalloping. 12 M.R.S.A. § 6701(2) (emphasis added). This language clearly continues the long-standing rule that each crew member on a scallop boat need not be licensed, but is unclear as to whether the licensee may be an owner not actually on board (as had been the case since 1953) or must be a person on board and in charge (as was the case prior to 1953).

Although the sponsor of the 1977 revision indicated on the Floor of the House of Representatives that the revision was intended not to make substantive changes in the law,^{8/} the 1977 change obviously muddied the water.

^{8/} The 1978 Maine Legislative Record 505 (1977) contains the following explanatory remarks by Representative Greenlaw:

The bill before the House today for final enactment is a complete revision of the statutes relating to Marine Resources. I have long believed it is a mistake for legislation of this magnitude and importance to be enacted without some debate or some statement in the record for future legislatures, the courts and, most importantly the citizens of this State to make reference to

The intent was not to substantively change the content to the statutes, and although there have been some minor changes made, we believe that members of the fishing industry are aware of the changes we have made.

See also the remarks of Senator Chapman of the Marine Resources Committee at 1978 Maine Legislative Record 505 (1977).

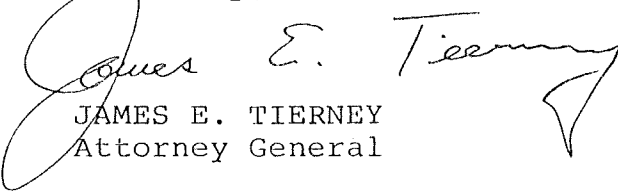
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CONCLUSION

In view of the extremely elliptical nature of the statute with regard to who may hold the license and the somewhat indirect way in which the problem was addressed in predecessor statutes, I cannot say with any certainty what the Legislature intended as to whether persons not actually on board may or may not be licensed. Consequently, I would respond simply that the Commissioner of Marine Resources would have the discretion in fashioning a licensing and enforcement policy to require licensees be actually on board or not as he sees fit pursuant to his statutory responsibilities. The parameters of 12 M.R.S.A. § 6701 can only be set in the context of live litigation. The Office of Attorney General stands ready to vigorously defend whatever interpretation or policy is established by the Commissioner.

If you have any further questions, please do not hesitate to contact me.

Sincerely,



JAMES E. TIERNEY
Attorney General

JET/kc