

DRAFT FOR REVIEW PURPOSES

AUGUST 31, 2020

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TITLE 250 – DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

CHAPTER 90 – MARINE FISHERIES

SUBCHAPTER 00 – N/A

PART 16 – Emergency Regulations Governing the Administration of Federal Fisheries Relief Funding Provided to the State of Rhode Island Under the CARES Act

16.1 Purpose

The purpose of these rules and regulations is to administer the \$3,267,923 allocation of federal fisheries relief provided to Rhode Island under Sec. 12005 of the CARES Act, P.L. 116-136 by expeditiously and equitably disbursing it in the form of direct payments to eligible fishery participants in the four sectors used by NOAA Fisheries to establish Rhode Island's allocation: commercial fishing, commercial aquaculture, seafood processing/wholesaling, and for-hire businesses.

16.2 Authority

These rules and regulations are adopted pursuant to R.I. Gen. Laws Title 20, Chapter 42-17.1, and promulgated in accordance with R.I. Gen. Laws Chapter 42-35.

16.3 Application

The terms and provisions of these Rules and Regulations shall be liberally construed to permit the Department to effectuate the purposes of state law, goals, and policies.

16.4 Severability

If any provision of these Rules and Regulations, or the application thereof to any person or circumstances, is held invalid by a court of competent jurisdiction, the validity of the remainder of the Rules and Regulations shall not be affected thereby.

16.5 Definitions

"ASMFC" means the Atlantic States Marine Fisheries Commission.

"Department" means the Rhode Island Department of Environmental Management.

"NOAA Fisheries" means the U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service.

"SAFIS" means the Standard Atlantic Fisheries Information System.

16.6 Findings

- A. On March 27, 2020, the President signed into law the Coronavirus Aid, Relief and Economic Security Act, or the CARES Act, as P.L. 116-136.
- B. Sec. 12005 of the CARES Act authorizes the Secretary of Commerce to provide \$300 million in appropriated funds to assist fishery participants affected by COVID-19, which may include direct payments. It defines fishery participants as Tribes, persons, fishing communities, aquaculture businesses, processors, or other fishing-related businesses who have incurred, as a direct or indirect result of the coronavirus pandemic, economic revenue losses greater than 35 percent as compared to their prior 5-year average revenue, or any negative impacts to subsistence, cultural or ceremonial fisheries.
- C. On May 7, 2020, the Secretary of Commerce announced the allocation of the \$300 million in fisheries assistance funding provided by Sec. 12005 of the CARES Act to the states, Tribes, and territories with coastal and marine fishery participants who have been negatively affected by COVID-19. The Secretary also announced the state allocations are to be administered through the interstate marine fishery commissions, i.e., the Atlantic States Marine Fisheries Commission (ASMFC) for Rhode Island.
- D. Rhode Island was initially allocated \$3,294,234. That amount was subsequently reduced to \$3,267,923 to account for administrative fees assessed by NOAA Fisheries and the ASMFC for the allocation and distribution of funding.
- E. On May 18, 2020, NOAA Fisheries issued a Request for Assistance letter to ASMFC, serving as guidance for the development of spend plans by individual states. An attachment to the letter set forth the methodology and data used by NOAA Fisheries to determine the individual state allocations – namely, available total annual revenue information from the commercial fishing, charter fishing, aquaculture, and processor sectors of coastal states, Tribes, and territories.
- F. On May 22, 2020, NOAA Fisheries provided a breakdown of the apportionments, for three of the four sectors, used to determine the individual state allocations. For Rhode Island, the apportionments are: 68.0% commercial fishing and aquaculture; 28.5% seafood processing; and 3.5% for-hire fishing. Since May 7, 2020, NOAA Fisheries has maintained and periodically updated a webpage addressing the fisheries relief funding

program, which together with the above-referenced Request for Assistance letter, constitutes the totality of guidance pertaining to the program. That webpage is found here: <https://www.fisheries.noaa.gov/feature-story/commerce-secretary-announces-allocation-300-million-cares-act-funding>.

- G. Consistent with the provisions of the Sec. 12005 of the CARES Act and the associated guidance provided by NOAA Fisheries, the Department initiated a public process to develop the spend plan for Rhode Island. The public process included a series of webinars and workshops to brief stakeholders on the program and solicit input on the development of the Rhode Island spend plan. A total of seven workshops were held on June 15, June 29, July 8, July 9, July 13, July 22, and July 30, 2020.
- H. As a component of the above-described public process, the Department sought and received feedback from stakeholders regarding the enactment of emergency regulations to implement the spend plan for Rhode Island, upon approval by NOAA Fisheries. All stakeholders supported the use of emergency regulations to expedite implementation of the fisheries relief program, in recognition that the issues addressed by regulation would be fundamentally the same as the provisions set forth in the spend plan.
- I. On August 5, 2020, the Department submitted the draft Rhode Island spend plan (dated July 27, 2020) to NOAA Fisheries for initial review. The core component of the draft spend plan is to provide direct payments to eligible fishery participants in the four sectors used by NOAA Fisheries to establish Rhode Island's allocation: commercial fishing, commercial aquaculture, seafood processing/wholesaling, and for-hire businesses.
- J. On August 18, 2020, NOAA Fisheries provided comments to the Department, specifying modifications to the draft Rhode Island spend plan needed to gain approval.
- K. On September 2, 2020, the Department conducted an eighth public workshop to review the final changes to the Rhode Island spend plan made in response to the comments provided by NOAA Fisheries. At that workshop, a draft of these emergency regulations was also provided for review and comment.
- L. On August xx, 2020, NOAA Fisheries granted final approval to the Rhode Island spend plan.
- M. These emergency regulations operationalize the process of disbursing Rhode Island's \$3,267,923 allocation under Sec. 12005 of the CARES Act, consistent with the provisions of the Act, the guidance provided by NOAA Fisheries, and the approved Rhode Island spend plan.

16.7 Assessment of Administrative Fees

- A. The Department will initially set aside \$100,000 from the allocation of funds to Rhode Island to cover the administrative costs of developing and implementing the Rhode Island spend plan. This is a maximum amount. Actual administrative costs will be determined upon conclusion of the appeal process, as set forth herein under § 16.12 of this Part.
- B. If actual administrative costs are determined to be in excess of \$100,000, no additional amount will be deducted from the allocation of funds to Rhode Island.
- C. If actual administrative costs are determined to be less than \$100,000, the amount remaining from the set aside will be distributed proportionally among the four sectors, pursuant to the sub-allocation and disbursement process set forth below.

16.8 Sector-Based Sub-Allocations

- A. \$3,167,923 will be allocated among the four sectors used by NOAA Fisheries to establish the allocation of funds to Rhode Island, via the same proportions used by NOAA, along with a state-specific sub-allocation for the for-hire sector, as follows:
 - 1. Commercial Fishing (62.6%): \$1,983,120
 - 2. Commercial Aquaculture (5.4%): \$171,068
 - 3. Seafood Processing/Wholesale (28.5%): \$902,858
 - 4. For-Hire Fishing (3.5%): \$110,877
 - 5. Party/Head Boat Sub-allocation (67%): \$74,288
 - 6. Charter Boat Sub-allocation (33%): \$36,589
- B. Upon completion of the appeals process, as set forth in § 16.12 of this Part, the Department will make any final adjustments to awards necessary to ensure that the total allocation to Rhode Island of \$3,167,923 is fully distributed to all eligible fishery participants. That is, any balances remaining in any sector will be reallocated, proportionally, to other sectors incurring shortfalls, and distributed, proportionally, to qualifying applicants in those sectors.

16.9 Eligibility Criteria

16.9.1 General:

- A. All applicants must meet the following criteria:

1. Must be a resident of Rhode Island, or a member of a federally recognized tribe residing in Rhode Island, upon date of application;
2. Must be 18 years of age or older, upon date of application;
3. Must have owned a properly licensed business in 2020 that was engaged in one or more of the four sectors, set forth below, between March 1 and May 31 during one or more years over the five-year period 2015-2019; and
4. Must have incurred, as a direct or indirect result of the coronavirus pandemic, a documented fishery-related loss in revenue, during the period between March 1 and May 31, 2020, greater than 35% relative to average fishery-related revenues earned during the same 3-month period over the prior 5 years (2015-2019), or active portion thereof if fishery-related revenues did not encompass the entire 5-year period.
5. Must not be debarred from receiving federal funds.
6. Must not be on the federal government's "do not pay" list.

16.9.2 Commercial Fishing Sector:

- A. In addition to the general requirements specified in § 16.9.1 of this Part, applicants in the commercial fishing sector must meet the following criteria:
1. Must be the owner of a commercial fishing vessel holding a commercial vessel declaration or landing permit issued by the Department in 2020 (owners of more than one qualifying vessel may submit separate applications for each vessel); or
 2. Must be the holder of a Rhode Island commercial fishing license, not affiliated with a fishing vessel/business, valid for 2020 (e.g., shore-based fishers).

16.9.3 Commercial Aquaculture Sector:

In addition to the general requirements specified in § 16.9.1 of this Part, applicants in the commercial aquaculture sector must be the owner of an aquaculture business, based in Rhode Island, who holds a Rhode Island-based aquaculture lease and a Rhode Island aquaculture license valid for 2020 (holders of more than one qualified lease may submit separate applications for each lease).

16.9.4 Seafood Processing/Wholesale Sector:

In addition to the general requirements specified in § 16.9.1 of this Part, applicants in the seafood processing/wholesale sector must be the owner of a seafood wholesale/processing business, with facility based in Rhode Island, who holds a dealer

license issued by the Department and a wholesaler's license issued by the Rhode Island Department of Health, both valid for 2020.

16.9.5 For-Hire Sector:

In addition to the general requirements specified in § 16.9.1 of this Part, applicants in the for-hire sector must be the owner of a for-hire vessel/business, who holds a Rhode Island party/charter license valid for 2020.

16.10 Application Procedures and Required Information, Certification and Documentation

- A. Consideration for direct payment will only be afforded to those who meet the eligibility criteria set forth in § 16.9 of this Part, who apply to the Department pursuant to the application procedures set forth below, and who provide all required information, certification, and documentation.
- B. Applicants who meet the eligibility criteria for more than one sector may apply for direct payment pursuant to more than one sector but must do so by submitting separate applications for each sector.
- C. Application:
 - 1. Applicants must complete the application form titled "Federal CARES Act – Fisheries Relief Affidavit and Application for Eligible Fishery Participants from Rhode Island," issued by the Department. The application form will be available at the following locations:
 - a. The Department's Office of Technical and Customer Assistance, located at 235 Promenade Street, Providence, RI 02908;
 - b. The Department's Division of Coastal Resources, located at 301 Great Island Road, Narragansett, RI 02882; and,
 - c. The Department's Division of Marine Fisheries, located at 3 Fort Wetherill Road, Jamestown, RI 02835.
 - d. Online at the Department's Marine Fisheries website at:
<http://www.dem.ri.gov/programs/marine-fisheries/Fisheries-CARES-Act.php>.
 - 2. Applications must be completed in full. Applications not completed in full will not be considered eligible.
 - 3. Applications must be notarized prior to submission.

4. Submission. Fully completed and notarized applications must be submitted in hard copy (i.e., hand delivered) during the application period, Monday through Friday, 8:30 am - 4:00 pm to either of the three offices set forth below. Neither mailed submission nor electronic submissions of application forms will be accepted.

- a. The Department's Division of Coastal Resources, 301 Great Island Road, Narragansett, RI 02882; or,
- b. The Department's Division of Marine Fisheries, 3 Fort Wetherill Road, Jamestown, RI 02835.
- c. The Department's Office of Technical and Customer Assistance, 235 Promenade Street, Providence, RI 02908

D. Application period: The application period is limited to the fifteen (15)-day period beginning on September 14, 2020 and ending on September 29, 2020. The application deadline is 4:00 pm on September 28, 2020. No applications will be accepted or considered if submitted after the application deadline.

Commented [RB1]: Subject to change depending on when NOAA grants final approval

E. Required Information, Certification, and Documentation:

1. All applicants must provide the following information as part of each application:

- a. Self-certification that the applicant meets the 35% loss-in-revenue threshold.
- b. Quantification of revenue loss during the 3-month reference period in 2020, relative to average revenue earned during the same 3-month period over the prior five years (2015-2019), or active portion thereof if revenues did not encompass the entire five-year period.
- c. Identification and submittal of data source(s) used to quantify revenue loss.
- d. Identification and quantification of any/all direct assistance received from other sources to cover COVID-19-related financial impacts.
 - (1) Not including one-time stimulus payments.
 - (2) Including unemployment insurance benefits, forgivable Payroll Protection Program loans, and any/all other forms of financial assistance, that are not subject to repayment.
- e. The amount of the applicant's claim for federal fisheries disaster assistance, based on subtracting any/all direct assistance as noted above

from the documented revenue loss during the 3-month reference period (March 1 - May 31) in 2020.

- f. Self-certification that the applicant is not seeking assistance that would render them “more than whole” in 2020 relative to their average revenue earned across the previous five years (2015-2019). That is, direct assistance received from all sources to cover COVID-19-related financial impacts in 2020 plus traditional revenue earned in 2020 cannot exceed average revenues over prior five years.
- g. Self-certification that the applicant has the records/documentation to support the reported loss, will retain those records for at least three (3) years after the close of the primary grant award to the Atlantic States Marine Fisheries Commission, and will make the records available upon request from the State of Rhode Island, NOAA, or the Office of the Inspector General, if necessary, for purposes of conducting individual or programmatic audits.
- h. Self-certification that the applicant is in good standing with respect to the payment of all tax obligations owed to the State of Rhode Island; and acknowledgement and agreement that if the applicant is not current, or fails to remain current, with respect to such tax obligations, the Department may require the return of funds obtained pursuant to the application.
- i. Consent to allowing the Department to use SAFIS data, Vessel Trip Reports (VTRs), dockside sales records, RI Coastal Resources Management Council Annual Aquaculture Questionnaires, information from the Rhode Island Department of Revenue, Division of Taxation, and other relevant data sources to verify the information provided by the applicant to quantify revenue loss; and consent to waive any and all confidentiality pertaining to this such information as it relates to the application.
- j. Consent to allow the Department to make available to the Rhode Island Department of Revenue, Division of Taxation information pertaining to final award amounts, along with information specific to the applicant and revenue-related information set forth in the application by the applicant, and only this specific information, for the purpose of verifying compliance with state tax obligations.
- k. Determination as to how each applicant wishes to be notified regarding the Department’s decision on each application: either via certified mail, or by picking up and signing for the decision letter at the Department’s

Marine Fisheries Office in Jamestown, or Coastal Resources Office in Galilee (Narragansett).

16.11 Evaluation, Award, and Notification

- A. Upon close of the application period, RIDEM will conduct an expeditious review of all applications.
- B. Drawing upon information available from the Department's Office of Boating Registration and Licenses, the Rhode Island Coastal Resources Management Council RI CRMC), and the Rhode Island Department of State, the Department will validate each application with regard to each applicant's license status, vessel ownership status, and business ownership status
- C. For applicants in the commercial fishing sector: Available records and statistics on the commercial fishing fleet and information requested from applicants will be used to determine minimum eligibility. Available and independently verifiable sources include the Department's commercial license and boat registration database, business records maintained by the Rhode Island Department of State, SAFIS dealer reports, dockside sales logbooks, VTRs, and state logbook reports (eTRIPS or paper logbook). Information from these same sources, as well as other information provided by applicants, will be used to verify losses.
- D. For applicants in the commercial aquaculture sector: Available records and statistics on the aquaculture industry and information requested from applicants will be used to determine minimum eligibility. Available and independently verifiable sources include RI CRMC lease approval records, the Department's aquaculture license database, business records maintained by the Rhode Island Department of State, and for 2020, SAFIS dealer reports. Information from verifiable sources such as RI CRMC Annual Aquaculture Questionnaires, Hazard Analysis Critical Control Point (HACCP) records, and other information provided by applicants, will be used to verify losses. Data sources used for verification may differ by participant depending on what data are available. Participants will be required to provide relevant HACCP reports and other relevant information documenting their sales.
- E. For applicants in the seafood processing/wholesale sector: Available records and statistics on the seafood processing/wholesale industry and information requested from applicants will be used to determine minimum eligibility. Available and independently verifiable sources include RIDEM's dealer license database, RIDOH's processor license database, business records maintained by the RI Department of State, and SAFIS dealer reports. Information from independently verifiable sources such as SAFIS dealer reports, as well as other information provided by applicants, will be used to verify losses.
- F. For applicants in the for-hire sector:

1. Available records and statistics on the for-hire fleet and information requested from applicants will be used to determine minimum eligibility. Available and independently verifiable sources include the Department's Party/Charter license and boat registration database, and business records maintained by the Rhode Island Department of State. Information from independently verifiable sources such as Vessel trip Reports (VTRs) and eTrips Mobile, as well as other information provided by applicants, will be used to verify losses. For active years in which data sources are not available, applicants will be required to provide information (e.g., business records) documenting their activity.
 2. For federal boats, years from 2015-2019 can be evaluated from VTRs or 2019 information from eTrips. For state-only boats, only 2019 eTrips information will be available.
 3. Information regarding number of trips and passenger capacity for the trips during the reference period will be used to quantify baseline activity for comparison to calculated losses.
 - a. Head boat passengers will be estimated via reported gear quantities in VTRs or eTrips, with the verification dataset varying depending on years of which the applicant asks to be reviewed.
 - b. Charter boat passengers will be assumed as six for all trips based on the fleet dynamics.
 - c. Revenue will then be quantified as a function of fees associated with passengers based on Lovell et al. (2020), with an estimated for-hire cost associated with passengers of \$106.75 (incorporating guide fees and crew tips).
- G. Pursuant to the Department's review of all applications, those applicants not meeting eligibility criteria, or who submit claims that do not align with the data sources used to establish claims, or who submit incomplete applications, will be issued letters of denial. Those receiving letters of denial may file an appeal to the finding no later than fifteen (15) calendar days following receipt of the letter, in accordance with §16.12 of this Part.
- H. The Department will tally all claims within each sector and, for each sector, undertake the following process of determining payment amounts:
1. For applicants in the commercial fishing sector:
 - a. If the total amount of claims is less than \$1,983,120, the Department will process payments for the full amount of each claim.

- b. If the total amount of claims is more than \$1,983,120, the Department will calculate the percentage of the total shortfall and apply that percentage to each claim.
2. For applicants in the commercial aquaculture sector:
- a. If the total amount of claims is less than \$171,068, the Department will process payments for the full amount of each claim.
 - b. If the total amount of claims is more than \$171,068, the Department will calculate the percentage of the total shortfall and apply that percentage to each claim.
3. For applicants in the seafood processing/wholesale sector:
- a. If the total amount of claims is less than \$902,858, the Department will process payments for the full amount of each claim.
 - b. If the total amount of claims is more than \$902,858, the Department will calculate the percentage of the total shortfall and apply that percentage to each claim.
4. For applicants in the for-hire sector:
- a. Party/Head boat permit holders: If the total amount of claims from eligible party/head boat permit holders is less than \$74,288, the Department will process payments for the full amount of each claim. If the total amount of claims is more than \$74,288, the Department will calculate the percentage of the total shortfall and apply that to each claim.
 - b. Charter boat permit holders:
 - (1) Eligible charter boat permit holders will receive equal compensation of the charter-boat sub-sector allocation; thus, the Department will process equal payments to all qualifying charter boat applicants based on the number of qualifying charter boat applicants.
 - (2) Applicants cannot be made more than whole. As such, if the equal distribution of funds, based on the number of qualifying claims and the charter-boat sub-allocation amount, results in equal payments that exceed any individual claims, those applicants will receive payments in the amount of their individual claims.

- (3) If the above-described disbursement process results in a balance of funds remaining in the charter boat sub-sector allocation, those funds will be reallocated to the head boat subsector to cover any shortfalls in that sub-sector.

- I. The Department will issue letters of eligibility to all qualifying applicants in all four sectors.
 1. Each letter will include the individual award amount based on the process described above.
 2. All qualifying applicants may file an appeal to the individual award amounts no later than fifteen (15) calendar days following receipt of the letter of eligibility in accordance with §16.12 of this Part.

16.12 Appeals

- A. Any applicant who submits an application during the application period, and is deemed ineligible for an award, may appeal that determination to the Director.
- B. Any applicant who submits an application during the application period, and is deemed eligible for an award, may appeal the determination of the amount of the award to the Director.
- C. All appeals must be submitted in writing and be filed with the Director no later than fifteen (15) calendar days following the applicant's receipt of the written notification from the Department regarding the application. All appeals shall include a cover letter setting forth the reason(s) the application should have been deemed eligible, or the reason(s) the award amount should be different, and include any/all supporting documentation. The filing deadline may be met by hand delivering a written appeal to the Department, at the address provided below, no later than 3:59 pm on the deadline date, or submitting a written appeal to the Department, at the address provided below, via mail, with a postmark no later than the deadline date.
- D. Appeals shall be filed with the RIDEM Office of Legal Services, Fisheries Relief Program, 235 Promenade St., Providence, RI 02908.
- E. There will be no opportunity to appeal a determination of ineligibility if such determination is based on the submittal of an application following the close of the application period.
- F. The Director or the Director's designee will review all appeals, determine whether the applicant/appellant has satisfied his/her burden of proving that the Department's determination was not consistent with the eligibility or award standards set forth in these regulations, and render final agency decisions based thereon.

- G. The Director shall provide all applicants/appellants with written notification of her final agency decision.

16.13 Final Awards and Issuance of Payments

- A. Upon completion of the appeals process, the Department will make any final adjustments to awards necessary to ensure that the \$3,167,923 total allocation to Rhode Island is fully distributed to all eligible applicants. That is, any balances remaining in any sector will be reallocated, proportionally, to other sectors incurring shortfalls, and distributed, proportionally, to qualifying applicants in those sectors.
- B. The Department will issue final letters of award, specifying the final amounts of each award, to all qualifying applicants in all four sectors.
- C. At the same time, the Department will forward the names, contact information, social security numbers and award amounts of all qualifying applicants to the Executive Director of the Atlantic States Marine Fisheries Commission (ASMFC), pursuant to a Cooperative Agreement between the Department and ASMFC that protects the confidentiality of information not subject to public disclosure. In turn, the ASMFC will issue payments to all qualifying applicants in accordance with the award amounts. The payments will be accompanied by 1099 forms, given the taxable nature of the payments.

16.14 Termination of Program

The activities of this funding program will be completed, and the program will be terminated, once the complete list of all final award recipients has been provided to the Atlantic States Marine Fisheries Commission, the Commission has issued all payments in accordance with that list, the Rhode Island Department of Revenue, Division of Taxation has addressed and fully resolved any tax obligations applicable to any awardees, and at least three years have elapsed since the close of the primary grant award to the Atlantic States Fisheries Commission.