

HEALTH AND SAFETY CODE CHAPTER 436. AQUATIC LIFE

HEALTH AND SAFETY CODE

TITLE 6. FOOD, DRUGS, ALCOHOL, AND HAZARDOUS SUBSTANCES

SUBTITLE A. FOOD AND DRUG HEALTH REGULATIONS

CHAPTER 436. AQUATIC LIFE

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 436.001. SHORT TITLE. This chapter may be cited as the Texas Aquatic Life Act.

Amended by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

Sec. 436.002. DEFINITIONS. In this chapter:

(1) "Approved area" means a molluscan shellfish growing area determined to be acceptable for harvesting of molluscan shellfish for direct marketing according to the National Shellfish Sanitation Program.

(2) "Approved source" means a source of molluscan shellfish acceptable to the director.

(3) "Aquatic life" means animals and plants that live in water.

(4) "Authorized agent" means an employee of the department who is designated by the director to enforce provisions of this chapter.

(5) "Board" means the Texas Board of Health.

(6) "Closed area" means a molluscan shellfish growing area where the taking including the harvesting for sale, the harvesting for transplant, or the gathering for depuration of molluscan shellfish is temporarily or permanently not permitted. A closed area status may be placed on any one of the five classified area designations established by the National Shellfish Sanitation Program.

(7) "Conditionally approved area" means a molluscan shellfish growing area determined to meet approved area criteria for a predictable period conditioned on performance standards specified in a management plan. A conditionally approved area is a closed area when the area does not meet the approved area criteria.

(8) "Conditionally restricted area" means a molluscan shellfish growing area determined to meet restricted area criteria for a predictable period conditioned on performance standards specified in a management plan. A conditionally restricted area is open for transplanting or gathering for depuration only during the times it meets the restricted area criteria and is specified as a conditionally restricted area by the department. A conditionally restricted area is a closed area at all times for harvesting of molluscan shellfish for direct marketing.

(9) "Container" means the physical material in contact with or immediately surrounding molluscan shellfish or crabmeat that confines it into a single unit.

(10) "Crabmeat" means the edible meat of steamed or cooked crabs that has not been processed other than by picking, packing, and chilling.

(11) "Crabmeat processing license" means a numbered document issued by the department that authorizes a person to process crabmeat for sale.

(12) "Crabmeat processor" means a person who cooks and backs crabs and who picks, packs, or pasteurizes crabmeat.

(13) "Department" means the Texas Department of Health.

(14) "Depletion" means the removal of all existing commercial quantities of market-size molluscan shellfish.

(15) "Depuration" means the process of using any approved artificially controlled aquatic environment to reduce the level of bacteria and viruses in molluscan shellfish.

(16) "Depuration plant" means a place where depuration of molluscan shellfish occurs.

(17) "Director" means the executive head of the Texas Department of Health.

(18) "Growing area" means an area that supports or could support live molluscan shellfish.

(19) "Health authority" means a physician authorized to administer state or local laws relating to public health.

(20) "Label" means written, printed, or graphic matter appearing on a container of molluscan shellfish or crabmeat,

including any written, printed, or graphic matter on any wrappers or accompanying any molluscan shellfish or crabmeat.

(21) "Molluscan shellfish" means an edible species of oyster, clam, or mussel that is shucked, in the shell, fresh, or fresh frozen, in whole or in part, as defined by the National Shellfish Sanitation Program.

(22) "National Shellfish Sanitation Program" means the cooperative program by the states, the United States Food and Drug Administration, and the shellfish industry that classifies molluscan shellfish growing areas and certifies interstate molluscan shellfish shippers according to the National Shellfish Sanitation Program Manual of Operations or its successor program and documents.

(23) "Open area" means a molluscan shellfish growing area where harvesting for sale, harvesting for transplant, or gathering for depuration of molluscan shellfish is permitted. An open area status may be placed on any one of the classified area designations established by the National Shellfish Sanitation Program except for a prohibited area.

(24) "Pasteurization plant" means a place where crabmeat is heat-treated in compliance with rules adopted by the board, without complete sterilization, to improve the keeping qualities of the meat.

(25) "Picking plant" means a place where crabs are cooked and edible meat is picked from the crabs.

(26) "Possess" means the act of having in possession or control, keeping, detaining, restraining, or holding as owner, agent, bailee, or custodian for another.

(27) "Prohibited area" means an area where the director finds, according to a sanitary, chemical, or bacteriological survey, that the area contains aquatic life that is unfit for human consumption. A prohibited area for molluscan shellfish means a molluscan shellfish growing area determined to be unacceptable for transplanting, gathering for depuration, or harvesting of molluscan shellfish. The only molluscan shellfish removal permitted from a prohibited area is for the purpose of depletion.

(28) "Principal display panel" means the part of a label that is most likely to be displayed, presented, shown, or examined under normal and customary conditions of display for sale.

(29) "Public water" means all bodies of water that are the property of the state under Section 1.011, Parks and Wildlife Code.

(30) "Restricted area" means a molluscan shellfish growing area that is determined to be unacceptable for harvesting of molluscan shellfish for direct marketing but that is acceptable for transplanting or gathering for depuration. A restricted area may be closed for transplanting or gathering for depuration when the area does not meet the restricted area criteria established by the National Shellfish Sanitation Program.

(31) "Sale" means the transfer of ownership or the right of possession of an item to a person for consideration and includes barter.

(32) "Shellfish certificate" means a numbered document issued by the department that authorizes a person to process molluscan shellfish for sale.

(33) "Shellfish processor" means a person who depurates, shucks, packs, or repacks molluscan shellfish.

(34) "Take" means catch, hook, net, snare, trap, kill, or capture by any means, including the attempt to take.

Amended by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

Sec. 436.003. AUTHORITY TO DELEGATE POWERS AND DUTIES.

(a) The board by rule may delegate a power or duty imposed on the director in this chapter, including the power or duty to issue emergency rules or orders or to render a final administrative decision.

(b) A health authority may delegate any power or duty imposed on the health authority in this chapter to an employee of the local health department, the local health unit, or the public health district in which the health authority serves, unless otherwise restricted by law.

Amended by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1,

SUBCHAPTER B. PROHIBITED ACTS

Sec. 436.011. PROHIBITED ACTS. The following acts and the causing of the following acts within this state are unlawful and prohibited:

(1) taking, selling, offering for sale, or holding for sale molluscan shellfish from a closed area;

(2) taking, selling, offering for sale, or holding for sale molluscan shellfish from a restricted or conditionally restricted area without complying with a rule adopted by the board to ensure that the molluscan shellfish have been purified, unless:

(A) permission is first obtained from the Parks and Wildlife Department and the transplanting is supervised by that department; and

(B) the Parks and Wildlife Department furnishes a copy of the transplant permit to the director before transplanting activities begin;

(3) possessing a species of aquatic life taken from a prohibited area while the area was prohibited for that species;

(4) operating as a molluscan shellfish processor without a shellfish certificate for each plant or place of business;

(5) operating as a crabmeat processor without a crabmeat processing license for each plant;

(6) selling, offering for sale, or holding for sale molluscan shellfish or crabmeat that has not been picked, handled, packaged, or pasteurized in accordance with the rules adopted by the board;

(7) selling, offering for sale, or holding for sale molluscan shellfish or crabmeat from facilities for the handling and packaging of molluscan shellfish or crabmeat that do not comply with the rules adopted by the board;

(8) selling, offering for sale, or holding for sale molluscan shellfish or crabmeat that is not labeled in accordance with the rules adopted by the board;

(9) selling, offering for sale, or holding for sale

molluscan shellfish that is not in a container bearing a valid certificate number from a state or nation whose molluscan shellfish certification program conforms to the current Manual of Operations for Sanitary Control of the Shellfish Industry issued by the Food and Drug Administration or its successor, except selling molluscan shellfish removed from a container bearing a valid certificate number for on-premises consumption; in the event the Texas Molluscan Shellfish Program is found to be out of conformity with the current Manual of Operations, selling, offering for sale, or holding for sale molluscan shellfish in a container bearing a valid Texas certificate number shall not be considered a violation of this chapter provided all other requirements of this chapter are complied with and the shellfish have come from an approved source;

(10) processing, transporting, storing for sale, possessing with intent to sell, offering for sale, or selling molluscan shellfish or crabmeat for human consumption that is adulterated or misbranded;

(11) removing or disposing of a detained or embargoed article in violation of Section 436.028;

(12) altering, mutilating, destroying, obliterating, or removing all or part of the labeling of a container;

(13) adulterating or misbranding molluscan shellfish or crabmeat in commerce;

(14) refusing to permit entry or inspection, to permit the taking of a sample, or to permit access to or copying by an authorized agent of a record required by this chapter;

(15) failing to establish or maintain a record or report required by this chapter or by a rule adopted by the board; or

(16) violating a rule adopted by the board or an emergency rule or order adopted by the director.

Amended by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

SUBCHAPTER C. ENFORCEMENT

Sec. 436.021. DEFINITION. In this subchapter, "detained or embargoed article" means molluscan shellfish or crabmeat that has

been detained or embargoed under Section 436.028.

Amended by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

Sec. 436.022. INSPECTION. (a) The director, an authorized agent, or a health authority may, on presenting appropriate credentials to the owner, operator, or agent in charge:

(1) enter at reasonable times, including when processing is conducted, an establishment or location in which molluscan shellfish or crabmeat is processed, packed, pasteurized, or held for introduction into commerce or held after introduction into commerce;

(2) enter a vehicle being used to transport or hold the molluscan shellfish or crabmeat in commerce; or

(3) inspect the establishment, location, or vehicle, including equipment, records, files, papers, materials, containers, labels, or other items, and obtain samples necessary for enforcement of this chapter.

(b) The inspection of an establishment or location is to determine whether the molluscan shellfish or crabmeat:

(1) is adulterated or misbranded;

(2) may not be processed, introduced into commerce, sold, or offered for sale under this chapter or the rules adopted by the board; or

(3) is otherwise in violation of this chapter.

(c) The director, an authorized agent, or a health authority may not inspect:

(1) financial data;

(2) sales data, other than shipment data;

(3) pricing data;

(4) personnel data, other than personnel data relating to the qualifications of technical and professional personnel; or

(5) research data.

Amended by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

Sec. 436.023. ACCESS TO RECORDS. A person who is required

to maintain records under this chapter or a rule adopted by the board or a person who is in charge or custody of those records on request shall permit the director, authorized agent, or health authority at all reasonable times to have access to and to copy the records.

Amended by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

Sec. 436.024. ACCESS TO RECORDS SHOWING MOVEMENT IN COMMERCE. (a) A commercial carrier or other person receiving or holding molluscan shellfish or crabmeat in commerce on request shall permit the director, authorized agent, or health authority at all reasonable times to have access to and to copy all records showing:

(1) the movement in commerce of the molluscan shellfish or crabmeat;

(2) the holding after movement in commerce of the molluscan shellfish or crabmeat; or

(3) the quantity, shipper, and consignee of the molluscan shellfish or crabmeat.

(b) The carrier or other person may not refuse access to and copying of the requested records if the request is accompanied by a written statement that specifies the nature or kind of molluscan shellfish or crabmeat to which the request relates.

(c) A carrier is not subject to other provisions of this chapter solely because of the carrier's receipt, carriage, holding, or delivery of molluscan shellfish or crabmeat in the usual course of business as a carrier.

Amended by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

Sec. 436.025. EMERGENCY ORDER. (a) The director may issue an emergency order that mandates or prohibits the taking, processing, or sale of molluscan shellfish or crabmeat in the department's jurisdiction if:

(1) the processing or sale of the molluscan shellfish or crabmeat creates or poses an immediate threat to human life or

health; and

(2) other procedures available to the department to remedy or prevent the threat will result in unreasonable delay.

(b) The director may issue the emergency order without notice and hearing if the director or a person designated by the director determines that issuing the emergency order without notice and hearing is necessary under the circumstances.

(c) If an emergency order is issued without a hearing, the department shall determine the earliest time and place for a hearing at which the emergency order shall be affirmed, modified, or set aside. The hearing shall be held under board rules.

(d) This section prevails over Sections 11.013 and 12.001. Amended by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

Sec. 436.026. VIOLATION; INJUNCTION. (a) The director, an authorized agent, or a health authority may petition the district court for a temporary restraining order to restrain a continuing violation or a threat of a continuing violation of Section 436.011 if the director, authorized agent, or health authority believes that:

(1) a person has violated, is violating, or is threatening to violate a provision of Section 436.011; and

(2) the violation or threatened violation creates an immediate threat to the health and safety of the public.

(b) If the court finds that a person is violating or threatening to violate Section 436.011, the court shall grant injunctive relief.

(c) Venue for a suit brought under this section is in the county in which the violation or threat of violation is alleged to have occurred or in Travis County.

Amended by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

Sec. 436.027. CIVIL PENALTY. (a) At the request of the director, the attorney general or a district, county, or municipal attorney shall institute an action in district or county court to

collect a civil penalty from a person who has violated Section 436.011.

(b) A person who violates Section 436.011 is liable for a civil penalty not to exceed \$25,000 a day for each violation. Each day of a continuing violation constitutes a separate violation for purposes of penalty assessment.

(c) In determining the amount of the penalty, the court shall consider:

(1) the person's history of previous violations under this chapter;

(2) the seriousness of the violation;

(3) any hazard to the health and safety of the public;

(4) the demonstrated good faith of the person; and

(5) other matters as justice may require.

(d) A civil penalty recovered in a suit instituted by the attorney general under this chapter shall be deposited in the state treasury to the credit of the general revenue fund. A civil penalty recovered in a suit instituted by a local government under this chapter shall be paid to the local government.

(e) Venue for a suit to collect a civil penalty brought under this section is in the municipality or county in which the violation occurred or in Travis County.

Added by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

Sec. 436.028. DETAINED OR EMBARGOED ARTICLE. (a) The director or an authorized agent may detain or embargo molluscan shellfish or crabmeat if the director or authorized agent believes or has probable cause to believe that the molluscan shellfish or crabmeat:

(1) is adulterated; or

(2) is misbranded so that the molluscan shellfish or crabmeat is dangerous or fraudulent under this chapter.

(b) The director or an authorized agent shall affix to any molluscan shellfish or crabmeat a tag or other appropriate marking that gives notice that the molluscan shellfish or crabmeat is, or is suspected of being, adulterated or misbranded and that the molluscan shellfish or crabmeat has been detained or embargoed.

(c) The tag or marking on a detained or embargoed article must prohibit the removal or disposal of the article unless permission is given by the director, the authorized agent, or a court.

(d) A person may not remove a detained or embargoed article from the premises or dispose of it without permission of the director, the authorized agent, or a court. The director or the authorized agent may permit perishable goods to be moved to a place suitable for proper storage.

(e) The director or an authorized agent shall remove the tag or other marking from a detained or embargoed article if the director or an authorized agent believes that the article is not adulterated or misbranded.

(f) The claimant of a detained or embargoed article may move the article to a secure storage area with the permission of the director or an authorized agent.

Added by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

Sec. 436.029. REMOVAL ORDER FOR DETAINED OR EMBARGOED ARTICLE. (a) The director or authorized agent may order the claimant or the claimant's agent to move a detained or embargoed article to a secure place to prevent the unauthorized disposal or removal of the article.

(b) If the claimant fails to carry out the order, the director or the authorized agent may move the article.

(c) If the director or the authorized agent moves the article, the director shall assess the cost of removal against the claimant.

(d) The director may request the attorney general to bring an action in the district court in Travis County to recover the costs of removal. In a judgment in favor of the state, the court may award costs, attorney fees, and interest from the date the expense was incurred until the date the department is reimbursed.

Added by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

Sec. 436.030. RECALL FROM COMMERCE. (a) The director may order a recall of molluscan shellfish or crabmeat with:

(1) the detention or embargo of molluscan shellfish or crabmeat;

(2) the issuance of an emergency order under Section 436.025; or

(3) both.

(b) The director's recall order may require that the molluscan shellfish or crabmeat be removed to one or more secure areas approved by the director or authorized agent.

(c) The recall order must be in writing and be signed by the director and may be issued:

(1) before or in conjunction with a tag or other marking as provided by Section 436.028;

(2) with an emergency order authorized by Section 436.025; or

(3) both.

(d) The recall order is effective until it expires by its own terms, is withdrawn by the director, is reversed by a court in an order denying condemnation, or is set aside at a hearing authorized by Section 436.025.

(e) The claimant shall pay the costs of the removal and storage of a recalled product. If the claimant or the claimant's agent fails to carry out the recall order, the director may recall the product. The director shall assess the costs of the recall against the claimant.

(f) The director may request the attorney general to bring an action in a district court in Travis County to recover the costs of recall. In a judgment in favor of the state, the court may award costs, attorney fees, and interest from the date the expense was incurred until the date the department is reimbursed.

Added by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

Sec. 436.031. CONDEMNATION. If molluscan shellfish or crabmeat is adulterated or misbranded, an action for the condemnation of the molluscan shellfish or crabmeat may be filed in a district court in whose jurisdiction the molluscan shellfish or crabmeat is located.

Added by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

Sec. 436.032. DESTRUCTION OF MOLLUSCAN SHELLFISH OR CRABMEAT. (a) The court may order the destruction of sampled, detained, or embargoed molluscan shellfish or crabmeat if the court finds that the article is adulterated or misbranded.

(b) After entry of the court's order, an authorized agent shall supervise the destruction of the article.

(c) The claimant shall pay the cost of the destruction of the article.

(d) The court shall order the claimant or the claimant's agent to pay court costs, storage fees, and other proper expenses.

Added by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

Sec. 436.033. CORRECTION BY PROPER LABELING. (a) A court may order the delivery of sampled, detained, or embargoed molluscan shellfish or crabmeat that is misbranded to the claimant for relabeling under the supervision of the director or an authorized agent if:

- (1) the court costs and other expenses have been paid;
- (2) proper labeling can correct the misbranding; and
- (3) the claimant executes a bond, conditioned on the

correction of the misbranding by proper labeling.

(b) The claimant shall pay the costs of the supervision.

(c) The court shall order the return of the molluscan shellfish or crabmeat to the claimant if the director or an authorized agent represents to the court that the molluscan shellfish or crabmeat no longer violates this chapter and that the expenses of supervision are paid.

Added by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

Sec. 436.034. ADMINISTRATIVE PENALTY. (a) The director may assess an administrative penalty against a person who violates Section 436.011 or an order issued under this chapter.

(b) In determining the amount of the penalty, the director shall consider:

- (1) the person's previous violations;
- (2) the seriousness of the violation;

- (3) the hazard to the health and safety of the public;
- (4) the person's demonstrated good faith; and
- (5) other matters as justice may require.

(c) The penalty may not exceed \$25,000 a day for each violation.

(d) Each day of a continuing violation constitutes a separate violation.

Added by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

Sec. 436.035. ADMINISTRATIVE PENALTY ASSESSMENT PROCEDURE. (a) The director may assess an administrative penalty only after a person charged with a violation is given an opportunity for a hearing.

(b) If a hearing is held, the director shall make findings of fact and shall issue a written decision regarding the violation and the amount of the penalty.

(c) If the person charged with the violation does not request a hearing, the director may assess a penalty after determining that a violation has occurred and the amount of the penalty.

(d) The director shall issue an order requiring a person to pay a penalty assessed under this section.

(e) The director may consolidate a hearing held under this section with another proceeding.

Added by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

Sec. 436.036. PAYMENT OF ADMINISTRATIVE PENALTY. (a) Not later than the 30th day after the date an order is issued under Section 436.035(d), the director shall notify the person against whom the penalty is assessed of the order and the amount of the penalty.

(b) Not later than the 30th day after the date notice of the order is given to the person, the person shall:

- (1) pay the penalty in full; or
- (2) seek judicial review of the amount of the penalty, the findings of the director, or both.

(c) If the person seeks judicial review, the person shall:

(1) send the amount of the penalty to the director for placement in an escrow account; or

(2) post with the director a bond for the amount of the penalty.

(d) A bond posted under this section must be in a form approved by the director and must be effective until judicial review of the order or decision is final.

(e) A person who does not send the money to the director or post the bond within the period described by Subsection (b) waives all rights to contest the violation or the amount of the penalty.

(f) The attorney general, at the request of the director, may bring a civil action to recover an administrative penalty assessed under this subchapter.

Added by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

Sec. 436.037. REFUND OF ADMINISTRATIVE PENALTY. Not later than the 30th day after the date of a judicial determination that an administrative penalty against a person should be reduced or not assessed, the director shall:

(1) remit to the person the appropriate amount of any penalty payment plus accrued interest; or

(2) execute a release of the bond if the person has posted a bond.

Added by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

Sec. 436.038. CRIMINAL PENALTY; DEFENSES. (a) A person commits an offense if the person intentionally, knowingly, recklessly, or with criminal negligence commits an unlawful act under Section 436.011.

(b) A violation of Section 436.011(1), (2), or (3) is a Class B Parks and Wildlife Code misdemeanor under Section 12.405, Parks and Wildlife Code. Each day of a continuing violation constitutes a separate offense. Commissioned officers of the Parks and Wildlife Department shall enforce Sections 436.011(1), (2), and (3).

(c) If it is shown at trial that the defendant has been convicted once within five years before the trial date of a

violation of Section 436.011(1) or (2), a violation by the defendant under Section 436.011(1) or (2) is a Class A Parks and Wildlife Code misdemeanor under Section 12.404, Parks and Wildlife Code.

(d) If it is shown at trial that the defendant has been convicted two or more times within five years before the trial date of a violation of Section 436.011(1) or (2), a violation by the defendant under Section 436.011(1) or (2) is a Parks and Wildlife Code felony under Section 12.407, Parks and Wildlife Code.

(e) A violation of Section 436.011(4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), or (15) is a Class A misdemeanor. Each day of a continuing violation constitutes a separate offense.

(f) A person is not subject to the penalties of Subsection (e) if the person received molluscan shellfish or crabmeat in commerce and delivered or offered to deliver the molluscan shellfish or crabmeat in good faith, unless the person refuses to furnish on request of the director, an authorized agent, or a health authority the name and address of the person from whom the product was received and copies of any documents relating to the receipt of the product.

(g) A publisher, radiobroadcast licensee, or agency or medium for the publication or broadcast of an advertisement, except the harvester, processor, distributor, or seller of molluscan shellfish or crabmeat to which a false advertisement relates, is not liable under this section for the publication or broadcast of the false advertisement unless the person has refused to furnish, on the request of the director, the name and address of the harvester, processor, distributor, seller, or advertising agency residing in this state who caused the person to publish or broadcast the advertisement.

(h) A person is not subject to the penalties of Subsection (e) for a violation of Section 436.011 involving misbranded molluscan shellfish or crabmeat if the violation exists only because the product is misbranded because of a mistake in advertising, unless the violation is committed with intent to defraud or mislead.

Added by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

Sec. 436.039. INITIATION OF PROCEEDINGS. The attorney general or a district, county, or municipal attorney to whom the director, an authorized agent, or a health authority reports a violation of this chapter shall prosecute without delay.

Added by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

Sec. 436.040. MINOR VIOLATION. This chapter does not require the director, an authorized agent, or a health authority to report for prosecution a minor violation of this chapter if the director, authorized agent, or health authority believes that the public interest is adequately served by a written warning.

Added by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

SUBCHAPTER D. ADULTERATED AQUATIC LIFE

Sec. 436.061. ADULTERATED AQUATIC LIFE. (a) A species of aquatic life is adulterated if it has been taken from an area declared prohibited for that species by the director.

(b) Molluscan shellfish or crabmeat is adulterated if:

(1) it bears or contains a poisonous or deleterious substance that may render it injurious to health unless the substance is a naturally occurring substance and the quantity of the substance in the molluscan shellfish or crabmeat does not ordinarily render the substance injurious to health;

(2) it consists in whole or in part of a diseased, contaminated, filthy, or putrid substance or if it is otherwise unfit for human consumption;

(3) it has been produced, prepared, packed, or held under unsanitary conditions whereby it may have become contaminated with filth or may have been rendered diseased, unwholesome, or injurious to health;

(4) it is in whole or in part the product of diseased aquatic life or has died otherwise than by taking;

(5) its container is made in whole or in part of a poisonous or deleterious substance that may render the contents injurious to health;

(6) it has been intentionally exposed to radiation,

unless the use of the radiation complied with a regulation or an exemption under Section 409, Federal Food, Drug, and Cosmetic Act (21 U.S.C. Section 348);

(7) a substance has been substituted in whole or in part for it;

(8) damage to or inferiority of the product has been concealed;

(9) a substance has been added, mixed, or packed to increase its bulk or weight, to reduce its quality or strength, or to make it appear better or of greater value than it is;

(10) it contains a chemical substance containing sulphites, sulphur dioxide, or any other chemical preservative that is not approved by the Animal Plant Health Inspection Service or by rules of the board;

(11) the molluscan shellfish have been taken from a closed area;

(12) the molluscan shellfish have been taken from a restricted or conditionally restricted area and have not been purified under the rules adopted by the board;

(13) the molluscan shellfish have been processed by a person without a shellfish certificate;

(14) the molluscan shellfish have not been handled and packaged in accordance with the rules adopted by the board;

(15) the crabmeat has been processed by a person without a crabmeat processing license; or

(16) the crabmeat was not picked, packed, or pasteurized in accordance with the rules adopted by the board.

Added by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

SUBCHAPTER E. MISBRANDING

Sec. 436.071. MISBRANDED MOLLUSCAN SHELLFISH AND CRABMEAT. Molluscan shellfish or crabmeat is misbranded if:

(1) its labeling is false, misleading, or fails to conform with the requirements of Section 436.081;

(2) it is offered for sale under the name of another food;

(3) its container is made, formed, or filled so as to

be misleading;

(4) a word, statement, or other information required by this chapter or a rule adopted under this chapter to appear on a label is not prominently and conspicuously placed on the label and is not likely to be read and understood by the ordinary individual under customary conditions of purchase and use; or

(5) it does not have a label containing:

(A) the name, address, and certification or license number of the processor;

(B) an accurate statement in a uniform location on the principal display panel of the quantity of the contents in terms of weight, measure, or numerical count; and

(C) a date as provided by rules adopted by the board.

Added by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

SUBCHAPTER F. LABELING AND PACKAGING

Sec. 436.081. FAIR PACKAGING AND LABELING. (a) A label on molluscan shellfish or crabmeat shall conform to the requirements for the declaration of net quantity of contents under Section 1453, Fair Packaging and Labeling Act (15 U.S.C. Section 1453), and the regulations adopted under that Act.

(b) The label on a package of molluscan shellfish or crabmeat that represents the number of servings contained in the package shall state the net quantity in terms of weight, measure, or numerical count of each serving.

(c) A person may not distribute or cause to be distributed in commerce any molluscan shellfish or crabmeat if a qualifying word or phrase appears with the statement of the net quantity of contents required by Subsection (a). A supplemental statement at another place on the package may contain descriptions in nondeceptive terms of the net quantity of contents, except the supplemental statement of net quantity of contents may not include a term qualifying a unit of weight, measure, or count that tends to exaggerate the amount of the shellfish or crabmeat in the package.

Added by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

Sec. 436.082. FALSE ADVERTISEMENT. An advertisement of molluscan shellfish or crabmeat is false if it is false or misleading in any manner.

Added by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

SUBCHAPTER G. AQUATIC LIFE FROM PROHIBITED AREAS

Sec. 436.091. DECLARATION OF PROHIBITED AREAS. (a) The director by order shall declare a body of public water to be a prohibited area if:

(1) the director finds, according to a sanitary, chemical, or bacteriological survey, that the area contains aquatic life that is unfit for human consumption; or

(2) aquatic life from a prohibited area may have been transferred to that body of public water.

(b) The director shall modify or revoke an order according to the results of a sanitary, chemical, or bacteriological survey conducted by the department. The director shall file the order in the department's office and shall furnish without charge a copy of the order describing prohibited areas on request.

(c) The director shall conspicuously outline prohibited areas on maps and shall furnish the maps without charge on request. The failure of a person to obtain that information does not relieve that person from liability under this chapter.

Added by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

SUBCHAPTER H. MOLLUSCAN SHELLFISH

Sec. 436.101. CLASSIFICATION OF GROWING AREAS. (a) The director by order shall designate an area that is coastal water according to the rules of the Parks and Wildlife Commission as an approved area, a conditionally approved area, a restricted area, a conditionally restricted area, or a prohibited area, according to the classification categories in the current National Shellfish Sanitation Program Manual of Operations or its successor. Coastal water is a prohibited area for the taking of molluscan shellfish unless designated otherwise by the director.

(b) The director shall prohibit the taking of molluscan shellfish for a specified period from water to which molluscan

shellfish may have been transferred from a restricted or conditionally restricted area.

(c) The director by order shall designate growing areas as closed areas or open areas. The director shall modify or revoke an order according to the results of sanitary and bacteriological surveys conducted by the department. The director shall file the order in the department's office and shall furnish without charge a copy of the order describing the open or closed area on request.

(d) The director shall conspicuously outline the classifications of areas for the taking of molluscan shellfish on maps and shall furnish the maps without charge on request. The failure of a person to obtain that information does not relieve that person from liability under this chapter.

Added by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

Sec. 436.102. DEPURATION. (a) The director may allow depuration by artificial means of molluscan shellfish taken from a restricted or conditionally restricted area, subject to the rules adopted by the board and under the supervision the director considers necessary to protect public health.

(b) A molluscan shellfish plant operator may employ an off-duty peace officer to monitor the gathering of shellfish for depuration from a restricted or conditionally restricted area as provided by the rules adopted by the board under Subsection (a). In this subsection, "peace officer" includes those persons listed in Article 2.12, Code of Criminal Procedure.

Added by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

Sec. 436.103. FEE ON OYSTER SALES; PENALTIES. (a) The first certified shellfish dealer who harvests, purchases, handles, stores, packs, labels, unloads at dockside, or holds oysters taken from the water of this state shall pay the state a fee of \$1 for each barrel of oysters harvested, purchased, handled, or processed by the certified shellfish dealer.

(b) For purposes of assessing the fee required by this section, three 100-pound containers of oysters is the equivalent of one barrel of oysters. A certified shellfish dealer may not

purchase or pack oysters in containers that, when packed, exceed 110 pounds in weight. A dealer who violates this subsection is liable for a penalty of \$5 for each container that exceeds 110 pounds.

(c) A certified shellfish dealer shall pay a fee or penalty imposed by Subsection (a) or (b) not later than the 20th day of the month following the month in which the barrel of oysters was handled. A dealer who fails to pay the fee or penalty in full within the prescribed period is liable for the amount of the fee or penalty and an additional penalty of 10 percent of the amount of the fee or penalty due. On certification by the comptroller that a fee is past due, the department may suspend, until the fee, penalty, or additional penalty is paid, the shellfish certificate of a certified shellfish dealer who fails to timely pay the fee, penalty, or additional penalty in full. The department, on certification from the comptroller that a certified shellfish dealer has refused to pay a fee, penalty, or additional penalty on written demand, may revoke the shellfish certificate of a certified shellfish dealer who refuses to pay a fee, penalty, or additional penalty.

(d) The comptroller shall collect fees and penalties under this section and may adopt rules, forms, and procedures for submission of fees and penalties under this section. Each month the comptroller shall report to the department the fees and penalties that are submitted to the comptroller.

(e) Before any other disposition of the fees and penalties collected under this section is made, two percent of the amount of the fees and penalties shall be deposited in the state treasury for appropriation for the use of the comptroller in the administration and enforcement of this section. The remainder of the fees and penalties collected under this section shall be deposited to the credit of the oyster sales account in the general revenue fund to be allocated each year for oyster-related activities, including:

- (1) collecting bay water and shellfish meat samples;
- (2) contracting for sample analysis for classification and opening or closing of oyster harvesting areas;
- (3) marking the boundaries of areas that are

designated open or closed under this subchapter;

(4) studying oyster diseases and other concerns affecting the availability of oysters for harvest;

(5) studying organisms that may be associated with human illness and that can be transmitted through the consumption of oysters;

(6) promotion and advertising of the Texas oyster industry by the Texas Department of Agriculture, including information, education, and training to consumers on safe and proper handling of oysters; and

(7) other oyster-related activities authorized or required by this chapter.

(f) Money in the oyster sales account shall first be allocated for funding the public health activities of bay water and shellfish meat sample collection and analysis and wholesale, retail, and consumer education before money is allocated for research or promotion.

(g) Subtitles A and B, Title 2, Tax Code, apply to the comptroller's administration, collection, and enforcement of this section to the same extent as if the fee imposed under this section were a tax imposed under Title 2, Tax Code.

(h) In monitoring compliance with the payment of fees imposed under this section, the comptroller shall monthly or annually, as determined by the comptroller, compare records of fees collected under this section to data collected by the Parks and Wildlife Department relating to oyster barrel purchases. If the comptroller finds a discrepancy between the two sources of information, the comptroller may consult the dealer's log required by the National Shellfish Sanitation Program to resolve the discrepancy. The comptroller may use the process described by this subsection in place of any other administrative process used by the comptroller in determining compliance with this section.

(i) A finding by the comptroller under Subsection (h) of a discrepancy that reflects an underreporting of oysters harvested, purchased, handled, or processed by a dealer constitutes prima facie evidence of a violation of this section in any administrative proceeding under this chapter.

Added by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.
Amended by Acts 1999, 76th Leg., ch. 1298, Sec. 2, eff. June 18,
1999; Acts 2001, 77th Leg., ch. 28, Sec. 1, eff. Sept. 1, 2001.

Sec. 436.104. OYSTER PROGRAM. (a) The department shall conduct sanitary surveys, bay water and shellfish meat sampling, and any other activities that are necessary to classify the bays from which oysters are harvested from private leases or public reefs as authorized by Section 436.101.

(b) The department shall conduct reasonable and prudent sampling activities at the earliest possible time following the designation as a closed area of an area from which oysters are harvested from private leases or public reefs:

(1) if a question exists about the closure, to confirm the need for the closure; or

(2) if there is reason to believe that the sampling will result in opening the area.

(c) In implementing the oyster program, the department shall follow standards that are at least as stringent as the guidelines adopted by the National Shellfish Sanitation Program. The department's approach shall be consistent with the purpose and intent of the National Shellfish Sanitation Program and the federal Food and Drug Administration policy statements regarding the consumption of raw molluscan shellfish.

(d) Until *Vibrio parahaemolyticus* guidelines are formally adopted into the National Shellfish Sanitation Program, the department shall follow standards that are at least as stringent as guidelines of the Interim Control Plan for *Vibrio parahaemolyticus* of the Interstate Shellfish Sanitation Conference for the purpose of designating harvest areas as closed areas related to *Vibrio parahaemolyticus*.

(e) The department shall open harvest areas designated as closed areas due to excessive levels of *Vibrio parahaemolyticus* in shellfish meat samples when the levels of *Vibrio parahaemolyticus* in the shellfish meat samples return to baseline levels.

(f) The department shall open harvest areas designated as closed areas due to sporadic non-outbreak illnesses as specified in

the Interim Control Plan when the levels in shellfish meats return to baseline levels or, if tdh+ serotypes were confirmed as the cause of the illnesses, when the virulent serotypes of *Vibrio parahaemolyticus* are absent in two consecutive samples of shellfish meats collected from the *Vibrio parahaemolyticus* sample stations in the closed area.

(g) The department shall open harvest areas designated as closed areas due to a confirmed *Vibrio parahaemolyticus* outbreak when the department determines that *Vibrio parahaemolyticus* strains of virulent serotypes are absent in those situations where O3:K6 or other tdh+ serotypes were confirmed as the cause of the outbreak. For purposes of this subsection, in Galveston Bay, *Vibrio parahaemolyticus* virulent strains shall be considered absent when 25 shellfish meat samples from any delineated harvest area that has been designated as a closed area do not result in reporting of the virulent strain that caused the outbreak.

(h) If a second confirmed outbreak of *Vibrio parahaemolyticus* illness occurs in an area, the department shall open a harvest area designated as closed when 50 shellfish samples do not result in the reporting of the virulent strain that caused the outbreak.

(i) If harvest areas designated as closed areas as a result of *Vibrio parahaemolyticus* cannot be opened as a result of the sampling under Subsection (f) or (g), the areas may be opened when environmental conditions develop that are unfavorable for *Vibrio parahaemolyticus* growth or when environmental conditions shift to conditions that are historically unrelated to outbreaks of *Vibrio parahaemolyticus*.

Added by Acts 1999, 76th Leg., ch. 1298, Sec. 3, eff. June 18, 1999.

Sec. 436.105. TEMPERATURE REQUIREMENTS. Following initial refrigeration after unloading from a harvest boat, molluscan shellfish shall be refrigerated in air temperatures at or below 45 degrees Fahrenheit at all times except during transfer from one storage area or transportation vehicle to another. Except for an immediate transfer, molluscan shellfish may not remain unrefrigerated during transfer from one storage area or

transportation vehicle to another.

Added by Acts 1999, 76th Leg., ch. 1298, Sec. 3, eff. June 18, 1999.

Sec. 436.106. TEMPERATURE ABUSE. If temperature abuse of oysters associated with possible *Vibrio parahaemolyticus* illnesses is identified at any point in the market chain from harvest to consumer, the department may not designate a harvest area as a closed area if the temperature abuse is the probable cause of the illness. This section does not preclude closures for investigations conducted in accordance with the National Shellfish Sanitation Program that are necessary to protect public health. If a harvest area has been designated as a closed area because the investigation could not be completed within the time required in the National Shellfish Sanitation Program and temperature abuse is determined, as a result of the investigation, to be the probable cause of the illnesses, the harvest area must be immediately designated as an open area.

Added by Acts 1999, 76th Leg., ch. 1298, Sec. 3, eff. June 18, 1999.

Sec. 436.107. TEXAS OYSTER COUNCIL. (a) The Texas Oyster Council is created.

(b) The council is composed of:

(1) two members appointed by the board as nominated by the Texas Oyster Growers and Dealers Association;

(2) one member appointed by the board as nominated by the Coastal Oyster Leaseholder's Association;

(3) two members appointed by the board from a list of oyster dealers who have held a shellfish certificate in this state for not less than six months of each of the three years preceding the nomination and who are certified at the time of appointment;

(4) one representative appointed by the chairman of the Interstate Shellfish Sanitation Conference; and

(5) three consumer members, including one person professionally licensed or with work experience in the field of environmental survey, environmental sanitation, environmental engineering, or a similar field related to environmental or pollution conditions and their effect on molluscan shellfish

harvest areas, appointed by the speaker of the house of representatives.

(c) Members of the Texas Oyster Council serve one-year terms expiring August 31 of each year and may be reappointed at the end of a term.

(d) A member of the Texas Oyster Council may not receive compensation for service on the council, but is entitled to reimbursement of expenses incurred by the member while conducting the business of the council, as provided by the General Appropriations Act.

(e) A person is not eligible for appointment as a consumer member of the Texas Oyster Council if the person or the person's spouse:

(1) is a harvester, processor, or wholesaler regulated under this chapter;

(2) is employed by a harvester, processor, or wholesaler regulated under this chapter;

(3) is a retailer of molluscan shellfish; or

(4) is employed by a retailer of molluscan shellfish.

(f) The Texas Oyster Council shall elect a presiding officer from among its members.

Added by Acts 1999, 76th Leg., ch. 1298, Sec. 3, eff. June 18, 1999.

Amended by Acts 2001, 77th Leg., ch. 28, Sec. 2, eff. Sept. 1, 2001.

Sec. 436.108. POWERS AND DUTIES OF TEXAS OYSTER COUNCIL.

(a) The Texas Oyster Council shall:

(1) advise the board on the criteria used by the director under Section 436.101 to designate growing areas as open or closed areas;

(2) advise the board on the development of standards and procedures relating to the licensing of molluscan shellfish processors under this chapter;

(3) advise the board on the content of the rules adopted to implement the provisions of this chapter relating to molluscan shellfish;

(4) perform any other functions requested by the board in implementing and administering the provisions of this chapter

relating to molluscan shellfish; and

(5) review information brought before the council relating to molluscan shellfish.

(b) The Texas Oyster Council is entitled to:

(1) obtain information that is furnished to the department or developed by the department as part of an investigation of a food-borne illness that is suspected of being related to molluscan shellfish, including:

(A) location and handling practices where suspect food may have been served;

(B) product labeling and records;

(C) distribution agent, methods, and handling practices;

(D) sources of product;

(E) sample collection and laboratory analysis; and

(F) any other nonmedical information that may aid in determining causes or routes of transmission of food-borne illness or suspected food-borne illness; and

(2) review the information provided under Subdivision (1) and report to the department on any matter of concern.

(c) The Texas Oyster Council may establish procedures for:

(1) meetings of the council;

(2) submission, consideration, and resolution of issues before the council; and

(3) reporting relating to the council's activities.

(d) The Texas Oyster Council may meet at the request of the department, may meet periodically to review completed activities of the department, or may meet to review ongoing activities of the department if the department appears to have exceeded the guidelines established in the National Shellfish Sanitation Program.

(e) A member of the Texas Oyster Council who receives information under Subsection (b) from confidential communications or records, as identified by the department, may not disclose the information outside of the council or the department. The department, by providing to the council public information that is

confidential or otherwise excepted from public disclosure under law, does not waive or affect the confidentiality of the information for the purposes of state or federal law or waive the right to assert exceptions to required disclosure of the information.

(f) The Texas Oyster Council is subject to Chapter 551, Government Code. The Texas Oyster Council is not required to conduct an open meeting to deliberate confidential communications and records provided under this section relating to the investigation of a food-borne illness that is suspected of being related to molluscan shellfish.

(g) A report produced by the Texas Oyster Council is public information.

Added by Acts 1999, 76th Leg., ch. 1298, Sec. 3, eff. June 18, 1999.

SUBCHAPTER I. GENERAL ADMINISTRATIVE PROVISIONS AND RULEMAKING
AUTHORITY

Sec. 436.111. DEFINITIONS. In this subchapter:

(1) "Certificate" means a shellfish certificate issued by the department.

(2) "License" means a crabmeat processing license issued by the department.

Added by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

Sec. 436.112. RULEMAKING AUTHORITY. The board may adopt rules for the enforcement of this chapter. The board shall adopt rules establishing specifications for molluscan shellfish processing and crabmeat processing and shall furnish without charge printed copies of the rules on request.

Added by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

Sec. 436.113. CERTIFICATION AND LICENSING PROCEDURES.

(a) A person may not operate as a molluscan shellfish or crabmeat processor unless the person submits an application for a certificate or a license to the department according to rules adopted by the board and receives a certificate or license for each plant or place of business.

(b) When an application has been properly filed with the department, the director or an authorized agent shall inspect the property identified in the application, including buildings and equipment, and the operating procedures under which the product is processed.

(c) The director shall issue a certificate or license to a person who operates a plant or place of business that conforms to the requirements of this chapter and rules adopted by the board.

(d) A certificate is nontransferrable and expires at 11:59 p.m. on August 31 of each year.

(e) A license is nontransferrable and expires at 11:59 p.m. on the last day of February each year.

(f) A person shall apply for a new certificate or license each year for each plant or place of business.

Added by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

Sec. 436.114. REFUSAL TO CERTIFY OR LICENSE; SUSPENSION OR REVOCATION OF CERTIFICATE OR LICENSE. (a) After notice to the applicant and opportunity for a hearing, the department may refuse an application for a certificate or a license or may suspend or revoke a certificate or license.

(b) The board by rule shall establish minimum standards for a certificate or license and criteria for the refusal to issue a certificate or license and the suspension or revocation of a certificate or license.

Added by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

Sec. 436.115. HEARINGS AND APPEALS. (a) A hearing under this chapter is governed by the procedures for a contested case hearing under Chapter 2001, Government Code and the board's formal hearing rules.

(b) An appeal from a final administrative decision under this chapter shall be conducted under Chapter 2001, Government Code.

Added by Acts 1993, 73rd Leg., ch. 336, Sec. 1, eff. Sept. 1, 1993.

Amended by Acts 1995, 74th Leg., ch. 76, Sec. 5.95(49), eff. Sept. 1, 1995.