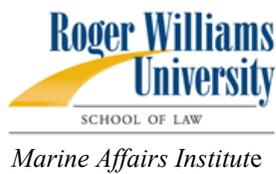




**LEGAL BARRIERS AND OPPORTUNITIES TO DEVELOPING BUSINESS
PARTNERSHIPS BETWEEN FISHERIES AND TOURISM**

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Executive Summary

Tourism is one of the largest contributors to Maine's economy, contributing billions of dollars annually. The primary draw for many tourists visiting Maine is the vast outdoor recreation that Maine affords its visitors. This paper examines the legal issues regarding the possibility of commercial fishing vessels carrying passengers for hire, as well as aquaculture farms opening themselves up for visits from tourists. To better understand the proposed process and its potential effects, this report is comprised of four sections:

Section I: Carrying Passengers for Hire

The first section highlights the numerous legal issues surrounding the allowance of commercial fishing vessels to carry passengers, from both a regulatory standpoint and the potential liability associated with such transport.

- From a regulatory standpoint, the opening section addresses various passenger vessel safety regulations. It distinguishes between an uninspected passenger vessel and an inspected passenger vessel, specifically as to the criteria for inspection of a vessel. Currently, Coast Guard regulations require that a vessel carrying passengers for hire must be operated by a licensed mariner. The opening section looks into the various ways a mariner can obtain a captain's license. It also touches on multiple Coast Guard regulations inclusive of the ability for a foreign-constructed vessel to engage in coastwise trade and the transport of passengers for hire as well as the vessel owner's requirements under the Americans with Disabilities Act.
- This next aspect of section one deals with the liability issues regarding a vessel owner's duty of care to his/her passengers; and possible ways a vessel owner could limit his/her liability, including the potential of drafting a waiver of liability and a forum selection clause. The section also addresses aspects of the Limitation of Liability Act. It will further examine the importance of obtaining and maintaining adequate marine insurance, along with some of the underwriter's initial requirements in order to protect and/or minimize the potential liability to the vessel owner.

Section II: Aquaculture Farms

- This section focuses on the potential liability to the aquaculture farmer and the duty of care that an aquaculture farmer owes to visitors at his/her facilities.
- In addition, the second part discusses bio-security issues associated with the opening of an aquaculture facility to the public; the importance of a bio-security

plan; and ways of minimizing the tourists' impact on an aquaculture farm from a bio-security perspective.

- Additionally, it addresses the requirements associated with aquaculture insurance, specifically how an aquaculture farmer would obtain adequate liability insurance in addition to his/her aquaculture insurance, which is generally considered to be property insurance.

Section III: Business Organizations

This section focuses on the various types of business organizations that are available that may serve to protect an individual from being held personally liable for the activities of the business. This includes multiple ways of forming a business entity and the importance of developing and maintaining business procedures and formalities in an effort to avoid a court's ability to potentially pierce the corporate veil, thereby holding business investors and its members personally liable for the overall actions of the business entity.

Section IV: Tourism

This final section deals directly with the tourism industry in Maine.

- It covers various ways that commercial fishermen and aquaculture farms can tap into the tourist industry by using well known media outlets, such as Facebook or other social media; advertising on tourism Websites; and developing partnerships with hotels and restaurants.
- This section also provides ways to create a partnership agreement with hotels and restaurants, including various types of alternative dispute resolution provisions within the agreement in an effort to minimize litigation costs should a dispute arise between the partners.
- This section also provides examples of commercial fishermen who have entered into the tourism industry, and the types of tours they offer.

Introduction

Tourism is one of the largest industries in Maine. Each year millions of people visit Maine and contribute billions of dollars into the state's economy. In 2011, an estimated 9.5 million overnight visitors and 13.8 million day visitors visited Maine during the summer months.¹ In 2006, visitors to Maine spent approximately \$1 billion on lodging, \$3 billion on food, and \$1 billion on recreational activities.² The primary purpose for visiting Maine, cited by both overnight and day visitors, was outdoor recreation.³ Given this, creating partnerships with the tourism industry could be a way that commercial fishermen and aquaculture operators could expand their business.

Maine's association with the lobster and fishing industry is an important part of Maine's cultural heritage as well as the coastal Maine tourist experience.⁴ In a paper published by the University of Maine Center for Tourism Research and Outreach, the researchers sought to "measure the value of the experiences that tourists derive from exposure to Maine's lobster industry and the culture of lobster fishing."⁵ In 2005, the most popular experiences cited by Maine's visitors were visiting small towns, visiting the beaches and the ocean, and eating lobster. There are two ways that fishing contributes to a tourist's experience when visiting Maine's coast: (1) the actual consumption of Maine's fresh seafood; and (2) the cultural experience of visiting a fishing village. This cultural experience includes visiting aquaculture farms and commercial

¹ Maine Office of Tourism Visitor Tracking Research 2011 Summer Season Topline Report 15 (2011). *available at*: <http://www.visitmaine.com/resource/visitmaine/vault/application/2011summerseasononline.pdf> [hereinafter *Maine Visitor Tracking*].

² The Univ. of Maine, Tourism and the Maine Econ. *available at*: <http://umaine.edu/tourism/rural-tourism-opportunities/tourism-and-the-maine-economy/>.

³ *Id.* at 26 & 27.

⁴ Harold Daniel, Thomas Allen, Lisa Bragg, Mario Teisl, Robert Bayer & Catherine Billings, *Valuing Lobster for Maine Coastal Tourism: Methodological Consideration*, *Journal of Foodservice*, March 19, 2008, at 133-134. *available at* <http://onlinelibrary.wiley.com/doi/10.1111/j.1745-4506.2008.00091.x/pdf> [hereinafter *Valuing Lobster*]

⁵ *Id.* at 133.

fishing villages, seeing fishing boats at the dock or moored in the harbor, and seeing the stacked lobster pots waiting to be used by the fishermen. The ability for tourists visiting coastal Maine to go out and observe how commercial fishermen work and catch fish, and view the operation of an aquaculture farm, could further add to the Maine tourism experience.⁶

Adding to the tourist experience would be the ability to observe firsthand the fishermen working the decks of their boat hauling and setting gear, seeing lobsters caught in traps, and observing the aquaculture farms. The ability to take tourists out on small tours to demonstrate a commercial fishing operation and show tourists how an aquaculture farm operates could contribute to the incomes of the fishermen and aquaculture operators, as well as greatly enhance the tourist experience. This paper examines potential legal issues surrounding the development of commercial lobster and aquaculture tourism within Maine. Such legal issues include:

- possible required licenses a vessel owner would need to obtain to take passengers for hire⁷ (PFH) on his/her vessel
- Coast Guard passenger vessel regulations
- potential liability concerns for both vessel and aquaculture owners and operators
- how vessel owners and aquaculture operators could potentially protect themselves from any lawsuits.

This paper is divided up into four sections:

Section I focuses on commercial fishing and examines what the Coast Guard regulations are for passenger vessels and captain licenses. Section I also examines issues that are associated with carrying passengers for hire, such as: being compliant with the Americans with Disabilities Act, vessel owner third party liability to passengers, and insurance issues.

⁶ *Id.* at 134.

⁷ Note: A passenger for hire means a passenger for whom consideration is contributed as a condition of carriage on the vessel. 46 U.S.C.S. § 2101(21a) (2012). Consideration means an economic benefit, inducement, right, or profit including payment accruing to an individual, person, or entity. 46 U.S.C.S. § 2101(5a) (2012).

Section II focuses on aquaculture and examines potential legal issues that could arise if tourists visit an aquaculture farm, including the importance of having adequate liability insurance coverage and implementing bio-security precautions.

Section III summarizes various business organizations and discusses ways to possibly limit liability through the formation of a business entity.

Section IV focuses on partnering the commercial fishermen and aquaculture operators with the tourist industry, examines potential ways to develop partnerships between these industries, and explores the legal issues surrounding the development of these partnerships.

Section I: Carrying Passengers for Hire Aboard Commercial Fishing Vessels

I.A. Introduction

There are several regulations and legal issues that arise whenever a vessel owner carries passengers for hire (PFH). These issues include complying with the Coast Guard regulations for the vessel, obtaining the necessary captain licenses, and protection from liability should someone onboard be injured. This section examines the potential regulatory requirements that vessel owners may need to comply with, as well as the potential legal issues that are associated with carrying PFH. In addition, this section also looks into vessel owner's liability and discusses ways to possibly limit liability to passengers, such as obtaining adequate marine insurance.

I.B. Coast Guard Vessel Regulations

I.B.1. Vessel Classification

Congress has created two types of categories for vessels engaged in commercial service:⁸ those vessels which are subject to inspection, and vessels that are not subject to inspection (also known as uninspected vessels). Vessels subject to inspection include freight vessels, seagoing motor vessels, seagoing barges, tank vessels, towing vessels, and passenger vessels.⁹ Fishing vessels¹⁰ are exempt from inspection and are considered an uninspected vessel not subject to the same regulations as passenger vessels, and instead have their own set of specific regulations.¹¹ Because of the development and implementation of two different regulations, those for both passenger vessels and fishing vessels, if a fishing vessel was to begin taking PFH, (for pay), that vessel may need to meet the regulations for both types of vessels, a passenger vessel as well as a commercial fishing vessel.

I.B.2. Uninspected Passenger Vessels

There are some passenger vessels that are not subject to inspection, “uninspected passenger vessels” (UPVs). Generally, a UPV is an uninspected vessel of less than 100 gross tons “carrying not more than 6 passengers, including at least one passenger for hire.”¹² Commercial fishing vessels that carry fewer than six passengers for hire may fall under this category, and therefore may not need to be inspected and required to receive a Certificate of Inspection (COI).

⁸ Note: Commercial service includes any type of trade or business involving the transportation of goods or individuals, except service performed by a combatant vessel. 46 U.S.C.S. § 2101(5) (2012).

⁹ 46 U.S.C.S. § 3301 (2012).

¹⁰ Note: Fishing vessel means a vessel that commercially engages in the catching, taking, or harvesting of fish or an activity that can reasonably be expected to result in the catching, taking, or harvesting of fish. 46 U.S.C.S. § 2101(11a) (2012).

¹¹ 46 U.S.C.S. § 3302 (2012).

¹² *Id.* § 2101(42)(B) (2012).

Despite not being inspected by the Coast Guard, UPVs must still be compliant with the “minimal federal standards for safety, navigation, pollution prevention;” and operator licenses must be issued by the Coast Guard.¹³ Some of the safety requirements include:

- carrying an automatically-activated emergency position indicating radio beacon (EPIRB)¹⁴ aboard the vessel when the vessel is operating more than three nautical miles from the coastline.
- having a Coast Guard approved life raft with enough capacity for everyone on board the vessel.¹⁵
- having at least one life preserver of suitable size for each person on the vessel.
- any vessel 26 feet or greater must have at least one Coast Guard approved life-buoy onboard.¹⁶ This life-saving equipment must be marked with the vessel’s name and be readily accessible in the event of an emergency.¹⁷
- carrying the necessary visual distress signals as well as portable and semi-portable fire-extinguishers required for that particular size vessel per Coast Guard regulations.¹⁸

In addition to carrying the necessary life-saving equipment onboard the vessel, UPVs must conduct a safety orientation for PFH onboard the vessel prior to the vessel getting underway.¹⁹ These safety orientations are conducted so that all passengers become acquainted with the locations of all stowed life preservers; the proper way of putting on and fitting the life

¹³ United States Coast Guard: Passenger Vessel Safety Program, <http://www.uscg.mil/pvs/UPV.asp>. [hereinafter *Passenger Vessel Safety Program*].

¹⁴ Note: An EPIRB when activated will either automatically or manually send a locating signal to search and rescue authorities indicating the location of the stricken sailors. Washington Department of Transport: Marine, <http://www.transport.wa.gov.au/imate/19164.asp>.

¹⁵ 46 C.F.R. § 25.26-10 (2012) & 46 C.F.R. § 25.25-17 (2012).

¹⁶ 46 C.F.R. § 25.25-5 (2012).

¹⁷ 46 C.F.R. § 25.25-7 (2012) & 46 C.F.R. § 25.25-9 (2012).

¹⁸ 46 C.F.R. § 25.25-19 (2012) & 46 C.F.R. § 25.30-20 (2012).

¹⁹ 46 C.F.R. § 26.03-1 (2012).

preserver; and the location of all other life-saving devices such as the EPIRB, life rafts, and the Emergency Check-Off List.²⁰ The Coast Guard requires that an emergency check-off list be posted in a “prominent and accessible place” so that passengers and crew are notified of the precautionary measures that may be necessary in the event of an emergency situation.²¹ Contained within the appendixes of this paper are hyperlinks to the Sample Emergency Check-Off List issued by the Coast Guard.²² The Coast Guard also requires that all vessels must carry adequate and up-to-date “charts, U.S. Coast Pilot, Coast Guard light list, tide tables, and current tables as appropriate for the intended voyage of the vessel.”²³

The Coast Guard has the authority to board every uninspected vessel under the regulations.²⁴ If a vessel is underway and hailed by the Coast Guard, that vessel must stop immediately and allow the Coast Guard to board the vessel. If the vessel operator fails to permit the Coast Guard to board the vessel or refuses to comply, the owner or operator will be subject to penalties.²⁵ When the Coast Guard boards a vessel, the boarding officer will identify him/herself to the master²⁶ of the vessel and explain the Coast Guard’s purpose for being on the vessel (such as conducting a safety inspection and checking to see if the vessel is compliant with the safety regulations).²⁷ If a UPV is operating in violation of any applicable laws or regulations, then the owner, master, and individual in charge are each liable for any criminal or civil penalties.²⁸ In addition to owner, master and individual in charge being liable for penalties, the vessel itself is

²⁰ *Id.*

²¹ *Id.* § 26.03-2.

²² *Id.*

²³ *Id.* § 26.03-4.

²⁴ *Id.* § 26.15-1.

²⁵ *Id.*

²⁶ Note: Master means the individual having command of a vessel also known as the vessel’s captain, the master may be different than the owner of a vessel. 46 U.S.C.S. § 10101 (2012).

²⁷ See *supra* note 24.

²⁸ 46 U.S.C.S. § 4106 (2012).

liable *in rem*²⁹ for the penalty.³⁰ To ensure that vessels are compliant with the necessary regulations prior to any surprise boarding, the vessel's owner may ask the Coast Guard or Coast Guard Auxiliary to conduct courtesy UPV examinations; which are free, comprehensive and confidential.³¹ If a vessel's owner wishes to have one of these examinations performed he/she should contact a local Coast Guard Sector Office.

I.B.3. Inspected Passenger Vessels

The Coast Guard regulates two classifications of inspected passenger vessels, depending on the gross tonnage³² of the vessel. A *passenger vessel* “means a vessel of at least 100 gross tons...carrying more than 12 passengers, including at least one passenger for hire [or] a ferry carrying a passenger.”³³ A *small passenger vessel* means “a vessel of less than 100 gross tons...carrying more than 6 passengers, including at least one passenger for hire.”³⁴ Generally, lobster vessels and smaller commercial fishing boats are less than 100 gross tons; therefore, this paper focuses primarily on the regulations regarding small passenger vessels as they are the regulations with which most fishing vessels carrying passengers will be required to comply.

I.B.3.a. Certificate of Inspection

Small passenger vessel regulations take into account a “vessel's length, passenger capacity, construction, equipment, intended service, and operating area;” and are therefore very specific to that individual vessel.³⁵ A small passenger vessel may not be operated with passengers for hire onboard without a valid U.S. Coast Guard issued COI; and whenever any

²⁹ Note: In Rem means “against a thing.” The court can place a judgment against the vessel itself. Black's Law Dictionary 864 (9th ed. 2009).

³⁰ See *supra* note 24.

³¹ *Passenger Vessel Safety Program*, *supra* note 13.

³² Note: Gross tonnage and gross tons “is an indicator of a vessel's approximate volume as determined in accordance with [the regulations] and recorded on the vessel's Tonnage Certificate.” 46 C.F.R. § 175.400 (2012).

³³ See *supra* note 12 at § 2101(22)..

³⁴ *Id.* § 2101(35).

³⁵ 46 C.F.R. § 175.200 (2012).

passengers are aboard, the vessel must be in full compliance with all the terms of the COI.³⁶

COIs are specific and custom to the individual vessel to which they are issued. When a COI is issued to a vessel, the document describes:

- the vessel
- the route that the vessel may travel
- the minimum manning requirements
- the number and types of safety and survival gear which must be onboard
- the maximum number of passengers
- the total number of persons (including crew) that may be carried.³⁷

Because COIs are specific and custom to the individual vessel to which they are issued, it is difficult to speculate what the COI would require other than having enough life preservers for each passenger allowed under the COI.

In order to obtain a COI a vessel owner must first fill out the application on Form CG 3752,³⁸ *Application for Inspection of U.S. Vessel*, and submit the form to the Coast Guard Officer in Charge, Marine Inspection (OCMI) of the marine inspection zone where the vessel is to be inspected.³⁹ The OCMI is a Coast Guard officer who is in charge of a marine inspection zone, “for the performance of duties with respect to the inspection, enforcement, and administration of vessel safety and navigation laws and regulations.”⁴⁰ If an owner is having a vessel constructed or an existing vessel converted, then the owner must submit an application for the initial

³⁶ *Id.* § 176.100.

³⁷ *Id.* at 176.103.

³⁸ Note: Form CG 3752 is a one page application form which asks the applicant basic questions about the vessel to be inspected such as the type of vessel; including the length, and hull material, the route the applicant wishes to have the vessel service. Form CG 3752 can be found here: http://www.uscg.mil/forms/cg/cg_3752.pdf.

³⁹ 46 C.F.R. § 176.105 (2012).

⁴⁰ *Id.* at 175.400.

inspection of the vessel prior to the start of the construction or conversion.⁴¹ In order to obtain a COI the construction, arrangement, and equipment of the vessel must be acceptable to the cognizant OCMI⁴² prior to the issuance of the initial COI. The cognizant OCMI will find a vessel acceptable based on the information, specifications, drawings and calculations available, and the successful completion of an initial inspection for certification.⁴³ A COI is valid for five years from the date it is issued; however, the cognizant OCMI may suspend, withdraw or revoke the COI at any time for noncompliance with the regulations.⁴⁴

The cognizant OCMI is the person who determines the total number of persons that can legally be carried aboard a vessel. When determining the total number of passengers, the cognizant OCMI may consider factors such as:

- the total weight of the number of passengers and crew
- any stability restrictions
- the route of the vessel
- the layout of the vessel
- means of evacuating the vessel
- the life-saving equipment;
- the minimum manning requirements for the safe operation of the vessel.⁴⁵

In addition, when determining the number of passengers that may be permitted on a vessel, the cognizant OCMI may not permit more passengers than are allowed under the regulations.⁴⁶ These requirements include:

⁴¹ *Id.*

⁴² Note: the “cognizant OCMI” is the OCMI that has immediate jurisdiction over a vessel for the purpose of performing the duties previously described. 46 C.F.R. § 175.400 (2012).

⁴³ See *supra* note 39.

⁴⁴ *Id.* at § 176.107.

⁴⁵ *Id.* at 176.112.

⁴⁶ *Id.* at 176.113.

- allowing one passenger for each 30 inches of rail space available to passengers at the periphery of each deck
- one passenger may be permitted for each 10 square feet of deck area available for the passengers' use
- one passenger permitted for each 10 inches of width of fixed seating.⁴⁷

Therefore, under the regulations, in order to maximize the number of passengers that a vessel owner wishes to carry onboard his/her vessel, as well as minimize the potential for injury, installing fixed benches for passengers to sit on may be the best option available to a potential passenger vessel operator; however, the options for compliance should be discussed with the cognizant OCMI during the initial inspection as described below.

I.B.3.b. Vessel Inspections

Prior to the issuance of a COI, an inspection of the vessel is required. Once the OCMI receives the application for inspection a marine inspector is assigned to inspect the vessel for compliance with the regulations. The vessel inspection can be performed at a mutually agreed upon location by the cognizant OCMI and the owner of the vessel. During the inspection of the vessel, the vessels owner(s) or representative(s) must be present at all times.⁴⁸ Vessel inspections are conducted to determine that the vessel and its equipment are in compliance with applicable regulations and safe to carry PFH. During the inspection the inspector may inspect the materials; workmanship; and condition of all parts of the vessel, its machinery, and its equipment; including all life-saving, fire-detecting and extinguishing equipment.⁴⁹

⁴⁷ *Id.*

⁴⁸ *Id.* § 176.400.

⁴⁹ *Id.* § 176.402.

During the inspection, it may be required that the vessel be dry-docked for examinations at the owner's expense.⁵⁰ In addition to the initial inspection, a vessel that has been exposed to saltwater more than three months in any 12-month period since the vessel's last dry dock examination must undergo a dry dock inspection once every two years.⁵¹ During the inspection the vessel must be hauled out of the water and an examination of all accessible parts of the vessel's underwater hull, including all hull fittings and running gear, are subject to inspection.⁵² At this time an internal structural inspection is to be conducted to examine the vessel's structural integrity, including internal framing and hull plating.⁵³

In order to be issued a COI the proposed vessel must also comply with the intact stability and seaworthiness regulations.⁵⁴ When a vessel completes a stability test the results of the test and the stability details must be documented on the vessel's COI, or in a stability letter issued by the cognizant OCMI.⁵⁵ If it is necessary for the safe operation of the vessel the cognizant OCMI has the authority to place specific stability restrictions in the stability letter or on the COI.⁵⁶ In addition, the stability test may also determine the number of total persons that are allowed onboard vessel for its safe operation. When a vessel is performing a simplified stability proof test the vessel's construction must be completed; any ballast, if necessary, must be onboard and properly in place; and all life-saving equipment must be properly stowed. The fuel and water tanks must be approximately three-quarters full; and weight equal to the total weight of all passengers, crew, and variable loads permitted on the vessel must be distributed to provide

⁵⁰ *Id.* § 176.600.

⁵¹ *Id.*

⁵² *Id.* § 176.610.

⁵³ *Id.*

⁵⁴ *Id.* § 178.115.

⁵⁵ *Id.* § 178.210.

⁵⁶ *Id.*

normal operating trim.⁵⁷ Currently, the Assumed Average Weight per Person (AAWPP) is 185 lbs (as of December 1, 2011). However, the AAWPP has been changing in recent years so it is essential that a vessel owner be aware of what the current AAWPP is, and if necessary, a new stability test may need to be performed to reflect the updated regulations.⁵⁸

If during an inspection of the vessel the inspector finds that the vessel or its equipment is not compliant with the regulations the owner or his/her agent will be made aware of these deficiencies.⁵⁹ The inspector will then discuss with the owner or his/her representative how to bring these deficiencies into compliance.⁶⁰ If, however, the deficiency is a serious safety hazard to the vessel or its passengers or crew, and exists through negligence or willful noncompliance, the marine inspector may issue a Report of Violation (ROV) to the owner or his/her representative.⁶¹

I.B.3.c. Life-Saving Equipment

The initial inspection will determine the necessary safety and life-saving equipment that the inspected passenger vessel must have onboard when the vessel is in the service of carrying PFH. These requirements will then be listed on the COI when it is issued to that particular vessel. During the initial and subsequent inspections the inspector will generally conduct an inspection of all the life-saving equipment and systems onboard, including: the lifejackets, passenger safety placards,⁶² and life rafts if required by the COI.⁶³ If any life-saving equipment is determined to not be in serviceable condition, or the expiration date has passed, it must be repaired or

⁵⁷ *Id.* § 178.330

⁵⁸ *Id.* § 170.090

⁵⁹ *Id.* § 176.801.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Note: A placard is an official document, such as a license or permit or an advertisement posted in a public place. Black's Law Dictionary 1266 (9th ed. 2009). On a passenger vessel such placards would include various documents including: life jacket instructions, the COI, and licenses.

⁶³ 46 C.F.R. § 176.808 (2012).

replaced.⁶⁴ If a lifejacket or other personal floatation device (PFD) is found to be defective and incapable of repair it must be destroyed in the presence of the inspector.⁶⁵

A small passenger vessel must be equipped with an adult-size lifejacket for each person authorized on the COI, and the vessel must also be equipped with a child-size life jacket equal to 10 percent of the maximum number of passengers permitted to be carried aboard the vessel.⁶⁶ In addition, the name of the vessel must be legibly marked on each life float and buoyant apparatus; and all life jackets, immersion suits, and life buoys.⁶⁷ If the vessel is required to and is equipped with an EPIRB the regulations require that the name of the vessel be clearly marked on the EPIRB.⁶⁸ Additionally, the number of persons that each life float and buoyant apparatus are designed to hold must be clearly marked.⁶⁹ During an inspection, the inspector may also require that an “abandon ship” or “man overboard” drill be conducted.⁷⁰ If an individual who holds a captain’s license commits an act of misconduct, negligence, or incompetence; and violates or fails to comply with any laws or regulations intended to promote marine safety at any time, then that individual is subject to proceedings, and his/her license may be suspended or revoked.⁷¹

I.B.3.d. Vessel is Operated Strictly as a Commercial Fishing Vessel

Under the regulations for a small passenger vessel the cognizant OCMI may endorse a vessel’s COI to allow the vessel to be operated as a commercial fishing vessel or other uninspected vessel.⁷² When the vessel is operating strictly as a commercial fishing vessel the vessel does not need to be in compliance with the COI requirements that apply when the vessel

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* § 185.604.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* § 185.910.

⁷² *Id.* § 176.114.

carries PFH.⁷³ However, when the vessel is engaging strictly as a commercial fishing vessel the vessel must be in satisfactory compliance with the life-saving equipment and regulations required for a commercial fishing vessel.⁷⁴ When a vessel is operating as a commercial fishing vessel under the regulations, the layout of the vessel may not change, and any equipment required by the COI must not be removed unless the cognizant OCMI has given permission for its removal.⁷⁵ If the COI requires that certain equipment, such as lifejackets or passenger seating, be onboard the vessel while it is engaged as a passenger vessel, and if the operator wishes to remove this equipment while the vessel is engaging in commercial fishing, then permission may be needed before the PFD equipment can be removed.⁷⁶

The commercial fishing endorsement issued by the cognizant OCMI “must indicate the route, maximum number of passengers, and the manning required when operating as a commercial fishing vessel.”⁷⁷ Therefore, if a vessel owner still wishes to engage in commercial fishing without PFH onboard, the vessel owner may need to discuss this practice with the cognizant OCMI when the initial COI is being issued, and document that the vessel will continue to engage in commercial fishing without PFH onboard.

Commercial fishing vessels are also required to carry certain safety equipment depending on where they are operating, which may be impractical to comply with while the vessel is operating as a passenger vessel. Under the regulations commercial fishing vessels may be required to carry at least one immersion suit, or exposure suit, or wearable PFD of the proper size for each individual onboard.⁷⁸ Wearable PFDs of this type are both expensive and specific

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* § 28.110.

for the individual person's body type and would cost a commercial fishing vessel owner a lot of money to have a surplus of immersion suits available for passengers. While the vessel is operating as a small passenger vessel engaged in commercial fishing the immersion suit requirement may be exempt for the passengers onboard the vessel if the owner can have this documented in the COI. However, in order to be compliant a vessel's owner(s) or representative(s) would need to discuss with the cognizant OCMI what safety equipment must be carried onboard the vessel while carrying passengers, and these requirements should be reflected in the COI. While the vessel is operating strictly as a commercial fishing vessel survival suits for the crew may be required to meet the necessary commercial fishing vessel safety regulations unless they are exempt.

I.B.4. Either an Inspected or Uninspected Passenger Vessel

The above briefly discusses the requirements for both an inspected and uninspected passenger vessel. The regulations state that a vessel that carries fewer than six PFH does not need to be inspected. Therefore, if a commercial fishing vessel wishes to carry fewer than six PFH then the vessels may not need to be inspected. It must, however, comply with both sets of regulations for both a commercial fishing vessel as well as a UPV. Because of the unique nature of carrying PFH aboard commercial fishing vessels, it is difficult to determine whether the Coast Guard would allow a commercial fishing vessel that carries six or fewer PFH to operate as an UPV. This is because of the potential hazards that are present onboard a commercial fishing vessel, such as: heavy fishing gear, lines and tackle throughout the deck, hydraulic machinery, and the possibility of commercial fishing vessels having an open transom. Whether or not a commercial fishing vessel could maintain its UPV classification would be a decision for the Coast Guard to make. Therefore, the Coast Guard should be consulted prior to the carriage of

any PFH so that the vessel owner can ensure that he is operating his/her vessel legally and within the regulations.

I.C. International Convention for Safety of Life at Sea

The International Convention for Safety of Life at Sea (SOLAS) is a series of international treaties regulating the safety of merchant ships sailing on international voyages. The first version of SOLAS was adopted in 1914 in response to the sinking of the *Titanic*, and has been amended periodically since then. The modern version of SOLAS was adopted in 1974 and specifies minimum safety standards for construction, equipment, and operation of vessels.⁷⁹ As long as a vessel does not carry more than 12 passengers and does not travel on international voyages (such as between the United States and Canada) the vessel does not need to be in compliance with SOLAS.⁸⁰ If the vessel does carry more than 12 passengers internationally the vessel must have a valid SOLAS Passenger Ship Safety Certificate.⁸¹ The cognizant OCMI is authorized to issue the SOLAS Certificate after it has been determined that the vessel complies with the applicable SOLAS regulations.⁸² The specific route must be listed on both the COI and the SOLAS Certificate.⁸³ The SOLAS Certificate is valid for one year from the time it is issued, and it may be revoked when the vessel is not in compliance with the SOLAS requirements.⁸⁴

⁷⁹ International Maritime Organization, International Convention for Safety of Life at Sea (SOLAS) 1974 *available at* [http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-\(SOLAS\)-1974.aspx](http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS)-1974.aspx) [hereinafter *SOLAS 1974*].

⁸⁰ 46 C.F.R. § 176.900 (2012).

⁸¹ *Id.* § 176.910.

⁸² Note: There are various requirements that a vessel seeking a SOLAS Passenger Ship Safety Certificate may need to comply with. For more details on the SOLAS requirements the Coast Guard has published the International Small Passenger Vessel Guide designed to assist preparing a vessel's owner to obtain their SOLAS Certificate. The Guide is *available at*: http://www.uscg.mil/pvs/docs/T_Boat_Int_1MAR2010.pdf.

⁸³ *Id.*

⁸⁴ *Id.*

I.D. Foreign Constructed Vessel Restrictions

In 1886, Congress passed the Passenger Vessel Services Act (PVSA), which established that “no foreign vessel shall transport passengers between ports or places in the United States.”⁸⁵ The purpose of the act was to protect U.S. shipping from foreign competition, and encourage the development of a domestic merchant fleet.⁸⁶ Under the statute, only a vessel that is constructed and wholly owned by citizens of the United States “for the purposes of engaging in coastwise⁸⁷ trade” and has a certificate of documentation and coastwise endorsement may transport passengers between ports or places in the United States to which coastwise laws apply.⁸⁸ The PVSA is similar to the Merchant Marine Act of 1920, also commonly known as the Jones Act. The difference between the PVSA and the Jones Act is the PVSA regulates passenger transportation between U.S. ports, and the Jones Act regulates maritime commerce in U.S. waters and U.S. ports.

The PVSA is currently administered by several federal agencies. The principle agency that enforces and administers the PVSA is U.S. Customs and Boarder Protection (U.S. Customs). However, U.S. Customs coordinates enforcement and administration of the PVSA with the Maritime Administration of the Department of Transportation, the Coast Guard, and the Department of Defense.⁸⁹ U.S. Customs considers “any person carried on a vessel who is not directly and substantially connected with the operation of such vessel,” such as the vessel’s crew

⁸⁵ U.S. Customs and Boarder Protection, What Every Member of the Trade Community Should Know About: The Passenger Vessel Services Act 7 (2010) *available at*: http://www.cbp.gov/linkhandler/cgov/trade/legal/informed_compliance_pubs/pvsa_icp.ctt/pvsa_icp.pdf [hereinafter *Passenger Vessel Services Act*].

⁸⁶ *Id.*

⁸⁷ Note: Coastwise refers to vessels engaged in domestic trade, or those traveling regularly from port to port in the United States. *Passenger Vessel Services Act*, *supra* note 86.

⁸⁸ 46 U.S.C.S. § 55103 (2012).

⁸⁹ *Passenger Vessel Services Act*, *supra* note 86 at 16.

or owner, is a passenger under coastwise laws.⁹⁰ U.S. Customs has held that an individual who is on board a charter party fishing vessel is a passenger under the coastwise laws. “In order for a person to not be considered a passenger, the connection between that person transported and the vessel must be direct and substantial” such as the vessel’s crew members.⁹¹

Congress has determined that the PVSA and “coastwise laws apply to the United States, including island territories and possessions of the United States.”⁹² U.S. Customs has held that a vessel transporting passengers between ports in territorial waters,⁹³ including U.S. inland waters, is engaging in coastwise transportation.⁹⁴ In order for a vessel to be coastwise qualified to carry passengers, the vessel must have a certificate of documentation with a coastwise endorsement issued by the Coast Guard.⁹⁵ A certificate of documentation will be issued with a coastwise endorsement as long as the vessel meets certain eligibility requirements, such as: built in the U.S., and owned by a U.S. citizen or corporation.⁹⁶

A non-coastwise-qualified vessel could violate coastwise regulations in many ways. Three common transportation violations occur when a non-coastwise-qualified vessel transports passengers: (1) when transporting passenger(s) directly between coastwise ports; (2) transporting passenger(s) between coastwise ports and the passenger(s) temporarily goes ashore at a coastwise port; and (3) when transporting passenger(s) between coastwise ports from a nearby foreign port,⁹⁷ such as from Canada.⁹⁸ A “cruise to nowhere,” where the vessel is transporting

⁹⁰ *Id.* at 9.

⁹¹ *Id.* at 10.

⁹² *Id.*

⁹³ Note: Territorial waters are the waters that extend three nautical miles seaward of the baseline. *Passenger Vessel Services Act*, *supra* note 86 at 11

⁹⁴ *Passenger Vessel Services Act*, *supra* note 86 at 11.

⁹⁵ *Id.* 12

⁹⁶ *Id.*

⁹⁷ Note: A nearby foreign port is any port in North America, Central America, the Bermuda Island, or West Indies with certain exceptions for some islands in the Caribbean. *Passenger Vessel Services Act*, *supra* note 86 at 12.

⁹⁸ *Passenger Vessel Services Act*, *supra* note 86 at 13.

passenger(s) from a U.S. port to the high seas or foreign waters, and then returns to the same port from which it embarked is not considered by U.S. Customs to be coastwise transportation of passengers.⁹⁹ Therefore, based on this information a passenger vessel that leaves port and cruises within the territorial sea but does not depart U.S. waters may be in violation of coastwise laws when that vessel returns to the same port from which it departed. However, if that vessel leaves U.S. waters and cruises on the high seas, then that vessel may not be violating coastwise regulations when that vessel returns to the same port. The penalty for violating coastwise regulations is “\$300 for each passenger transported and landed.”¹⁰⁰

There are several very specific exceptions to vessels engaging in coastwise trade. These exceptions are: transporting passengers between Puerto Rico and other U.S. ports; transporting passengers between the port of Rochester, New York and Alexandria Bay, New York; and the transportation of passengers between ports in southeastern Alaska on Canadian vessels.¹⁰¹ Currently, there are no exceptions for the transportation of passengers on Canadian vessels between ports in Maine. The PVSA may only be waived in the interest of national defense and the Secretary of Defense may request the Secretary of the Department of Homeland Security to waive the PVSA.¹⁰²

Whether or not a vessel constructed in Canada would qualify as a coastwise-qualified-vessel, or whether the passenger transportation activity that a vessel is engaging in (such as leaving and returning to the same dock after a tour of Maine’s coast) qualifies as a coastwise transportation activity is very difficult to speculate based on the regulations. The main determination of whether a vessel would qualify as a coastwise-qualified vessel is whether the

⁹⁹ *Id.* at 15.

¹⁰⁰ *Id.* at 14.

¹⁰¹ *Id.* at 15.

¹⁰² *Id.*

vessel is documented. However, if the owner of a vessel is unsure as to whether he/she is in need of a coastwise endorsement on his/her documentation then the vessel's owner should contact the Carrier Rulings Branch of the U.S. Customs Service as well as discuss the requirements with the cognizant OCMI to determine what particular requirements, under the regulations, need to be met for that individual vessel engaging in that specific activity.¹⁰³

I.E. American's With Disabilities Act

Owners and operators of passenger vessels are prohibited from discriminating against passengers on the basis of disability.¹⁰⁴ Vessel owners and operators must take steps to accommodate passengers with disabilities on their vessels, and related facilities¹⁰⁵ must be accessible.¹⁰⁶ The regulations apply to the owner or operator of any passenger vessel that is primarily engaged in the business of transporting people, whose operations impact commerce and provide a specified public transportation.¹⁰⁷ Based on the language of the statute, a commercial fishing vessel that carries passengers part-time but is primarily engaged in commercial fishing might be exempt from complying with the regulation because the vessel is not "primarily engaged in the business of transporting people." To determine what regulations the passenger vessel must comply with, a passenger vessel owner may obtain information and

¹⁰³ Marinetitle.com, what is a coastwise endorsement for vessel documentation? *available at:* http://www.marinetitle.com/coast-guard-documentation.htm#What_is_a_coastwise_endorsement.

¹⁰⁴ 49 C.F.R. § 39.1 (2012).

¹⁰⁵ Note: Facility means "all or any portion of buildings, structures, sites complexes, equipment, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located." 49 C.F.R. § 39.3 (2012).

¹⁰⁶ Note: Accessible with respect to vessels and facilities means complying with the applicable regulations. 49 C.F.R. § 39.3 (2012).

¹⁰⁷ 49 C.F.R. § 39.5 (2012).

guidance or other assistance concerning the regulations from the Department of Transportation.¹⁰⁸

In general, a passenger vessel owner must not discriminate against any qualified individual with a disability¹⁰⁹ by reason of such disability with respect to the individual's use of the vessel. The vessel owner must make reasonable modifications in policies, practices, and procedures when they are necessary to afford such services to individuals with disabilities, unless such modifications would fundamentally alter the nature of such services.¹¹⁰ Vessel owners in general must not refuse to provide transportation or use of a vessel to a passenger with a disability on the basis of their disability; however, if transportation is refused based on an individual's disability, a written statement of the reason for refusal must be provided to that person.¹¹¹ Vessel owners may deny transportation or restrict services to a passenger with a disability if "necessitated by [a] legitimate safety requirements" and actual risks not based on mere speculation, stereotypes or generalizations, are present.¹¹² However, a vessel owner must first take actions that impose the minimum feasible burdens or limitations on a passenger with a disability before refusing to transport the passenger.¹¹³ If a vessel owner "can meet legitimate safety requirements by a means short of refusing transportation to a passenger, then the vessel owner must do so."¹¹⁴ A captain may reasonably limit the number of disabled passengers with mobility devices if, in the captain's judgment, weight or stability issues are presented by the

¹⁰⁸ *Id.* § 39.107.

¹⁰⁹ Note: A Qualified individual with a disability mean an individual with a disability who is a passenger, with respect to obtaining transportation on or use of a passenger vessel. 49 C.F.R. § 39.3 (2012).

¹¹⁰ 49 C.F.R. § 39.21 (2012).

¹¹¹ *Id.* at 39.25.

¹¹² *Id.* at 39.27.

¹¹³ *Id.*

¹¹⁴ *Id.*

presence of mobility devices and the devices would conflict with legitimate safety requirements.¹¹⁵

A vessel owner must ensure that dock facilities are readily accessible to and usable by individuals with disabilities, this includes docks being wheelchair-accessible.¹¹⁶ If a passenger with a disability requests assistance in moving between the dock entrance and the area of the dock where people board and disembark the vessel, assistance must be provided.¹¹⁷ If a passenger with a disability can get on and off the vessel without assistance, the vessel owner is not required to provide assistance to the passenger; however, if assistance is provided to all passengers it must also be offered passengers with disabilities.¹¹⁸ If a passenger with a disability cannot get on and off the vessel without assistance, assistance must be provided to ensure that the passenger can get on and off the vessel.¹¹⁹

I.F. Licenses

I.F.1. Captain License and Merchant Mariner Credential

Any person that operates a vessel that carries one or more PFH is required to have a valid Coast Guard captain's license, also known as a Merchant Mariner Credential¹²⁰ (MMC) officer endorsement that is suitable for the vessel's route and service.¹²¹ The operator must have the

¹¹⁵ *Id.* at 39.29.

¹¹⁶ *Id.* at 39.61.

¹¹⁷ *Id.* at 39.81.

¹¹⁸ *Id.* at 39.83.

¹¹⁹ *Id.*

¹²⁰ Note: A Merchant Mariner Credential (MMC): Issued by the Coast Guard, the MMC is a combination of the individuals merchant mariner's document, license, and certificate of registry into a single credential similar to a passport which serves as the mariner's qualification document, identification, and certificate of service. 46 C.F.R. § 10.107 (2012). For this report an MMC and captain's license will be used interchangeably.

¹²¹ 46 C.F.R. § 26.20-1 (2012).

license in his/her possession and it must be produced immediately upon the request of a Coast Guard boarding officer.¹²²

There are many grades of captain's licenses and endorsements that a mariner may earn depending on the experience of the individual and the activity that individual wishes to perform. The basic license is the Operators of Uninspected Passenger Vessel (OUPV), also known as a "six-pack" License; and it is appropriate for those who wish to operate an uninspected passenger vessel carrying six or fewer PFH. An OUPV license is good for operating passenger vessels that typically engage in charter fishing, whale watching, scuba diving and tour cruises limited to six PFH.¹²³ A master license is an upgrade to the OUPV license and is issued to those who operate inspected vessels such as a small passenger vessel. It allows the license holder to carry more than six passengers for hire.¹²⁴ The upgrade from an OUPV to a master license simply requires an additional Coast Guard examination as well as 720 days at sea for a near-coastal master's license, compared to the 360 days required for an OUPV license. The size tonnage of a master's license issued as well as operating restrictions is dependent on the individual's experience.¹²⁵ Because a mariner typically earns his/her OUPV license first and then upgrades to the master's license, this section discusses the general licensing requirements that a mariner would need to obtain his/her captain's license.

An MMC for both a six-pack and a master's license is valid for a term of five years from the date issued, and all endorsement under that MMC are valid until the expiration date of the MMC.¹²⁶ If the MMC has expired then the mariner may not serve under the authority of that

¹²² *Id.*

¹²³ *Id.*

¹²⁴ The Nautical School, Masters Upgrade, *available at*: <http://www.nauticalschool.com/licenseTypes.html#2>.

¹²⁵ *Id.*

¹²⁶ 46 C.F.R. § 10.205 (2012).

MMC until it has been renewed. There is a one year grace period beyond its expiration date.¹²⁷

When a new MMC is issued before the expiration date, the replaced MMC is no longer valid.¹²⁸

The mariner must retain his/her MMC at all times and must produce the document to verify qualifications when requested by an authorized official.¹²⁹

I.F.1.a. Obtaining a Merchant Mariner's Credential

The holder of a valid MMC is allowed to serve in any capacity endorsed by the MMC or a capacity covered by a general endorsement.¹³⁰ MMCs are issued to applicants who are qualified by the National Maritime Center or by any Regional Exam Center during normal business hours or through the mail.¹³¹ In order to receive an MMC the applicant must meet several requirements established by the Coast Guard, including having:

- a signed and completed application
- proof that the applicant holds or has applied for a TWIC¹³²
- evidence the applicant has passed a chemical test for dangerous drugs
- documentation and evidence of the applicants sea time or vessel experience
- documentation of having passed a physical including a hearing and eye exam
- consented to the Coast Guard check of his/her national driving record for any offenses
- proof of CPR certification
- documented proof of U.S. citizenship
- proof of having taken an oath that he/she will faithfully and honestly perform all duties required by law and obey all lawful orders of superior officers.¹³³

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* § 10.203.

¹³⁰ *Id.* § 10.201.

¹³¹ *Id.*

¹³² Note: TWIC stands for Transportation Worker Identification Credential and is an identification credential issued by the Transportation Security Administration. 46 C.F.R. § 10.107 (2012). The specific requirements for obtaining a TWIC will be covered later in the paper.

I.F.1.b. Coast Guard Examination and Approved Courses

In order to obtain an MMC, the applicant must pass the Coast Guard examination given at an REC during period intervals.¹³⁴ The test consists of four sections: (1) Rules of the Road, which covers Coast Guard navigation rules and regulations; (2) Deck/General Safety Exam; (3) Navigation General Exam; and (4) the Navigation Plotting Exam.¹³⁵ If the applicant fails three or more sections of the exam, a complete re-examination must be taken. If the applicant fails three or more sections again, the applicant must wait three months before he/she may take another examination.¹³⁶ The applicant has the option of taking a Coast Guard approved course that administers its own examination upon completion of the course.¹³⁷ There are several benefits to taking an approved course, such as a limited number of test questions, and all the subject areas are covered by the course, ensuring that the student has a thorough understanding of all relevant material prior to taking the exam.¹³⁸

I.F.1.c. Criminal Record Review

Upon receipt of an MMC application packet, the Coast Guard may conduct a criminal record review to determine whether the applicant is suitable for an MMC.¹³⁹ Each applicant must disclose all convictions not previously disclosed to the Coast Guard.¹⁴⁰ In addition, the applicant will have his/her fingerprints recorded when he/she applies for a TWIC; and his/her fingerprints will be kept on file and used by the Coast Guard to determine whether the applicant has a record

¹³³ 46 C.F.R. § 10.225 (2012).

¹³⁴ *Id.* § 11.217.

¹³⁵ The Nautical School, What is a TWIC Card and Do I Need One, *available at*: <http://www.nauticalschool.com/faqs.html#12>.

¹³⁶ See *supra note* 136.

¹³⁷ 46 C.F.R. § 11.301 (2012).

¹³⁸ The Nautical School, What is a U.S. Coast Guard Approved Course, *available at*: <http://www.nauticalschool.com/faqs.html#1>.

¹³⁹ 46 C.F.R. § 10.211 (2012).

¹⁴⁰ *Id.*

of any criminal convictions.¹⁴¹ If after a criminal record review the Coast Guard determines that the applicant is not a safe and suitable person or “cannot be entrusted with the duties and responsibilities of the MMC or endorsement applied for, the application may be disapproved.”¹⁴² A person is not eligible for an MMC if he/she has been convicted of a violation of the dangerous drug laws of the United States, unless he/she meets an exception under the regulations.¹⁴³ If an application is disapproved then the applicant will receive written notification as well as the reasons for disapproval, and will be advised of any appeal procedures.¹⁴⁴

I.F.1.d. National Driver Register

An applicant will not be issued an MMC unless the applicant consents to a check of the National Driver Register for any vehicle traffic offenses, including driving while intoxicated, reckless driving, and racing on highways.¹⁴⁵ If an applicant has one or more incidences on his/her record, the Coast Guard may consider factors to determine an applicant’s suitability to hold an MMC, including: proof of completing a rehabilitation program, active membership in a rehabilitation or counseling group, character references, and steady employment.¹⁴⁶ An applicant may be disapproved if the Coast Guard determines that the applicant “cannot be entrusted with the duties and responsibilities of the MMC for which the application is made” and the applicant will be notified in writing.¹⁴⁷

I.F.1.e. Medical and Physical Requirements

In order to receive an MMC the applicant must meet medical and physical standards required by the Coast Guard. All required exams must be performed by a licensed medical

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* § 10.213.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

doctor. The physical examination of an applicant must include: a vision test including a color vision test, a hearing test, a drug test, and a general medical exam.¹⁴⁸ Physical examinations must be submitted within 10 months from the date signed by the licensed professional.¹⁴⁹ If the applicant does not meet the necessary physical requirements the Coast Guard may grant a waiver “if extenuating circumstances warrant special consideration.”¹⁵⁰

I.F.1.f. Drug Chemical Testing

In order to qualify for an MMC, the Coast Guard requires that an MMC applicant submit evidence that he/she has passed a chemical test¹⁵¹ for dangerous drugs.¹⁵² In addition, the Coast Guard requires marine employers to conduct several pre-employment and random chemical testing requirements prior to providing an MMC. A marine employer is defined by the Coast Guard as “the owner, managing operator, charterer, agent master, or person in charge of a vessel, other than a recreational vessel.”¹⁵³ Based on this broad definition, a commercial fishing vessel owner would qualify as a marine employer. The Coast Guard requires that a marine employer cannot employ crewmembers unless they have passed a “dangerous chemical” test.¹⁵⁴ In addition to a pre-employment drug-testing program all marine employers are to establish a random “dangerous chemical” test for all crewmembers and masters, including the vessel owner if they are self-employed or acting as master of the vessel.¹⁵⁵ If a vessel is involved in a serious

¹⁴⁸ *Id.* § 10.215.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Note: Chemical tests for dangerous drugs include testing for marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines. 46 C.F.R. § 16113.

¹⁵² See *supra* note 135.

¹⁵³ 46 C.F.R. § 16.105 (2012).

¹⁵⁴ *Id.* § 16.210.

¹⁵⁵ *Id.* § 16.230.

marine incident¹⁵⁶ then all persons directly involved are required to be chemically tested for evidence of dangerous drugs and alcohol.¹⁵⁷

If a marine employer fails to implement a chemical testing program and comply with the Coast Guard requirements for chemical testing, he/she is liable for up to \$5,000 for each violation.¹⁵⁸ If an individual fails a chemical test then it will be presumed that the individual is a user of dangerous drugs, and if the individual holds an MMC then the test failure must be reported to the OCMI.¹⁵⁹ In addition to being reported to the OCMI, that individual must be denied employment or removed from his/her duties that impact the safe operation of the vessel.¹⁶⁰ If the individual who fails a chemical test does not possess an MMC then the individual must be denied employment or removed from his/her duties that would affect the safe operation of the vessel.¹⁶¹ All marine employers are required to maintain records of chemical tests performed and make these records available to the Coast Guard upon request.¹⁶² The records should identify how many individuals have been tested, the number of those individuals who have failed the chemical tests, and the number and types of drugs for which those individuals have tested positive.¹⁶³

I.F.2. Transportation Worker Identification Credential

In order to obtain any valid MMC, including an OUPV and master license, an applicant must have a valid Transportation Worker Identification Credential (TWIC) issued by the Transportation Security Administration. The TWIC program was established when Congress

¹⁵⁶ Note: A serious marine incident includes events involving a vessel in commercial service where one or more people died; injury to crewmember or passenger requiring professional medical attention beyond first aid; damage to property in excess of \$100,000; or the actual or constructive loss of a vessel. 46 C.F.R. § 4.03-2 (2012).

¹⁵⁷ *Id.* § 16.240.

¹⁵⁸ *Id.* § 16.115.

¹⁵⁹ *Id.* § 16.201.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* § 16.260.

¹⁶³ *Id.*

passed the Maritime Transportation Security Act in 2002.¹⁶⁴ After the attacks of September 11, 2001, Congress found that U.S. ports are important to commerce; and these ports are susceptible to large scale acts of terrorism that could cause a “large loss of life or economic disruption.”¹⁶⁵ The purpose of the TWIC card is to ensure that individuals who would possibly pose a threat to port and vessel security do not gain unescorted access to vital secured areas within a port or vessel.^{166,167} Examples of vital secured areas are restricted areas within a shipping port, and the engineering sections and the bridge of a large passenger vessel.

In order to obtain a TWIC an applicant can pre-enroll online at www.tsa.gov/twic. There, the applicant will enter biographic information required for a security assessment as well as make an appointment at a TWIC enrollment center. The applicant must present identification documents at his/her appointment (such as an unexpired passport, an unexpired driver’s license, an original copy of a birth certificate or a U.S. social security card).¹⁶⁸ The applicant will complete the *TWIC Disclosure and Certification Form*, pay the enrollment fee, complete a fingerprint scan, and have his/her photograph taken.¹⁶⁹ Once the appropriate background checks have been completed the applicant will be notified when his/her TWIC is available for pick up and must proceed to the enrollment center to obtain his/her TWIC. On March 19, 2012 the enrollment fee for the TWIC program was reduced to \$129.75. If the applicant has a current and

¹⁶⁴ 46 U.S.C.S. § 70105 (2012).

¹⁶⁵ *Id.* § 70101.

¹⁶⁶ Note: There has been some discussion within the Coast Guard about the possible implementation of a policy that when a MMC is up for renewal that the mariner may not need to renew their TWIC card if the mariner would not need the TWIC card to gain access to secured ports. At the time of MMC renewal the mariner could write a statement stating that they no longer wish to renew their TWIC card. However, the regulations currently do not reflect this policy and mariners wishing to renew their MMC should contact their local Regional Exam Center to get information on the current regulations. Additionally, applicants wishing to obtain an original MMC must obtain a TWIC.

¹⁶⁷ Transportation Security Administration, TWIC Program Information, *available at*: http://www.tsa.gov/what_we_do/layers/twic/program_info.shtm.

¹⁶⁸ Transportation Security Administration, Required Documentation for U.S. Citizenship, *available at*: http://www.tsa.gov/assets/pdf/approved_twic_identification_docs.pdf.

¹⁶⁹ Transportation Security Administration, What is the process for obtaining a TWIC, *available at*: http://www.tsa.gov/what_we_do/layers/twic/twic_faqs.shtm#twic_process.

comparable background check, the fee is \$105.25.¹⁷⁰ A TWIC is valid for five years from the time of issue. If the original TWIC is lost, stolen, or damaged the replacement fee is \$60.¹⁷¹

I.F.3. Marine Radio Operator Permit

A Marine Radio Operator Permit (MROP) is required to operate the radio onboard vessels that carry more than six passengers for hire.¹⁷² In order to receive a MROP, an applicant must be a legal resident of the United States, be able to receive and transmit spoken messages in English, and pass a written examination.¹⁷³ The written examination consists of 24 questions on basic radio law and practices with which the operator should be familiar.¹⁷⁴ The applicant must then submit the application form and proof of passing certificates to the FCC. The license is issued for the applicant's lifetime.¹⁷⁵

I.F.4. Fishing Licenses

Because this paper focuses on the ability of commercial fishing vessels to carry passengers for hire, it will be assumed that the commercial fishermen have all the required licenses and permits for the specific commercial fisheries in which they are engaged. Therefore, this report will not go into much detail regarding commercial fishing licenses. However, there are three licenses which should be mentioned because they are different than a commercial fishing license and would possibly allow a commercial fisherman to engage in more activities with tourists in addition to commercial fishing; and because this might clarify what commercial fisherman can and cannot do with these licenses. These licenses are Maine's wholesale and retail licenses, the marine harvesting demonstration license, and the recreational fishing operator's

¹⁷⁰ Transportation Security Administration, Why Was the TWIC Enrollment Fee Reduced, *available at*: http://www.tsa.gov/what_we_do/layers/twic/twic_faqs.shtm#reduced_payment.

¹⁷¹ See *supra* note 171 & 172.

¹⁷² Federal Communication Commission, Marine Radio Operator Permit, *available at*: <http://wireless.fcc.gov/commoperators/index.htm?job=mp>.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

license. Obtaining these licenses could potentially help commercial fishermen because it would allow them to engage in activities that are generally not covered under commercial fishing licenses.

I.F.4.a. Dockside and Restaurant Sales of Seafood

Under Maine laws, a person with either a commercial fishing license or a Maine lobster and crab fishing license is allowed to sell fish, lobster, and crabs that he/she has harvested.¹⁷⁶ There seems to be no restrictions within the law that requires a commercial fisherman to only sell to a licensed seafood wholesaler or retailer. Therefore, under the laws it may be possible for a commercial fisherman to sell his/her catch dockside to the tourists who observed the fish, lobster, and crabs being caught during their experience onboard the vessel. Furthermore, the commercial fisherman may be able to sell his/her catch directly to the restaurants, hotels, and inns with which the commercial fisherman has partnered. However, the commercial fisherman should discuss with the Department of Marine Resources (DMR) the regulations regarding selling his/her catch at the dock to passengers; this way, the commercial fisherman can know exactly what sales activities he/she can and cannot do with his/her commercial fishing licenses and permits. A commercial fisherman may also be required by DMR to report his/her catch landings and sales to DMR.¹⁷⁷

There is a restriction stating that a lobster and crab license does not allow the commercial fisherman to remove lobster meat from the shell; therefore, if lobsters are sold to tourists, the lobsters must be sold intact.¹⁷⁸ In order to remove the lobster meat from the shell the person removing the meat must hold a valid lobster meat permit, which authorizes them to remove the

¹⁷⁶ Me. Rev. Ann. tit. 12, § 6501 (2011) & Me. Rev. Ann. tit. 12, § 6421 (2011)

¹⁷⁷ Maine's Department of Marine Resources, Frequently Asked Questions About Maine Landing and Catch Reports, *available at*: <http://www.maine.gov/dmr/commercialfishing/landingsfaq.htm>.

¹⁷⁸ Me. Rev. Ann. tit. 12, § 6421 (2011).

lobster meat only at a particular establishment.¹⁷⁹ There is an exception under the statute that allows hotels and restaurants to remove the lobster meat for serving within that hotel or restaurant's premises.¹⁸⁰ Because of this exception, combined with the ability for commercial fishermen to sell their catch to anyone (regardless of whether they hold seafood wholesale or retail licenses) commercial fishermen may want to develop a relationship with local restaurants and hotels to feature their fresh catch. Featuring a commercial fisherman's fresh caught seafood within a hotel would also further the commercial fisherman's ability to get tourists to go out on his/her vessel and actually see where the seafood that the hotel serves is coming from.

I.F.4.b. Marine Harvesting Demonstration License

A commercial fisherman who holds a marine harvesting demonstration license (MHDL) is allowed to engage in fishing activities to provide an educational demonstration of marine harvesting techniques.¹⁸¹ The MHDL was developed because there are a limited number of commercial lobster and crab licenses issued, and several educational institutions and organizations only wanted to demonstrate how commercial lobster fishermen catch their lobsters.¹⁸² To address this issue, DMR developed the MHDL to allow these groups to set and haul lobster traps.¹⁸³ A person who holds a MHDL is not allowed to fish more than 20 lobster traps from their vessel.¹⁸⁴ In addition to limiting the number of lobster traps that a vessel may carry onboard, a holder of a MHDL is not allowed to retain and sell any of his/her catch and must release all marine life caught back into the waters where it was harvested.¹⁸⁵ The MHDL is not specific as to whether a MHDL only applies to lobster and crab fishing activities, and not

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* § 6857.

¹⁸¹ *Id.* § 6810-A.

¹⁸² Note: Information provided by Deirdre Gilbert, Special Assistant to the Commissioner, Maine Department of Marine Resources.

¹⁸³ *Id.*

¹⁸⁴ See *supra* note 183.

¹⁸⁵ *Id.*

finfish. However, the text of the statute is focused on lobster and crab fishing and requires that the applicant: (1) successfully complete a lobster and crab fishing written examination; or (2) hold a lobster and crab fishing license and has landed lobster under that license.¹⁸⁶

If a commercial fisherman holds a valid commercial fishing license for the species that he/she would be harvesting while passengers are onboard the vessel, he/she would not need to obtain a demonstration license. Obtaining a MHDL may not be necessary for a commercial fisherman as it does not provide special privileges. The holder of an MHDL must still comply with all the regulations that are applicable to commercial fishermen, including season and day restrictions.¹⁸⁷ For example, the MHDL does not allow the commercial fisherman to continue to provide tours and demonstrate commercial fishing during restricted or closed seasons.¹⁸⁸ Additionally, on Sundays when commercial fishermen are prohibited from hauling and setting their lobster traps, an MDHL license holder is also prohibited from setting and hauling his/her traps. If a commercial fisherman wished to engage in tours and fishing on Sundays when operating under a commercial license is prohibited, that fisherman would have to apply for a special exemption license, which needs to be approved by a DMR special counsel.¹⁸⁹

I.F.4.c. Recreational Fishing Operator's License

Generally, in order to recreationally fish in Maine a person over 16 years of age must have a recreational fishing license issued by DMR. One of the few exceptions to this regulation is that passengers on a vessel operated by a captain who holds a Recreational Fishing Operators License (RFOL) can legally recreational fish under that captain's RFOL.¹⁹⁰ A commercial fisherman may want to receive his/her RFOL because this license will enable him/her to take

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ See *supra* note 184.

¹⁸⁹ *Id.*

¹⁹⁰ Me. Rev. Ann. tit. 12, § 6312 (2011).

passengers out not only to observe commercial fishing, but also to legally recreational fish from the vessel. An RFOL will also enable commercial fishermen the ability to take passengers out to recreationally fish when a commercial fishing season is closed, thus allowing the commercial fishermen some additional months of tourist operations. In order to be eligible to hold an RFOL an individual needs to be a licensed captain of a vessel that is licensed to carry passengers for hire. There is no cost to acquire a RFOL.¹⁹¹ Additionally, an RFOL holder is required to collect data on the number of persons engaging in saltwater recreational fishing on their vessel and report the data to DMR.

I.G. Liability

I.G.1. Introduction

Maritime law is one of the world's oldest bodies of law and crosscuts many areas of law such as contract law, workers compensation law, personal injury law, and tort¹⁹² law.¹⁹³ Admiralty law is made up of statutes and regulations as well as common law.¹⁹⁴ This section is designed to give the vessel owner an introduction into maritime law and liability, and discuss some of the various ways that his/her liability could be limited should an issue arise aboard his/her vessel. Because of the uniqueness of maritime law, should an incident arise it is advised that a vessel's owner retain a practicing attorney who is experienced in maritime law. The maritime attorney could specifically consult with and provide further detail to the vessel owner on much of what will be covered within the following sections.

¹⁹¹ *Id.*

¹⁹² Note: A tort is a civil wrong, other than breach of contract, for which a remedy may be obtained in the form of damages; a breach of a duty that the law imposes on persons who stand in particular relation to one another such as the duty the captain of a vessel owes to his passengers. Black's Law Dictionary 1626 (9th ed. 2009).

¹⁹³ Frank L. Maraist & Thomas C. Galligan, Jr., Admiralty: In a Nutshell 1 (Thomson West 2005) (1983).

¹⁹⁴ Note: Common law means the body of law derived from judicial decisions rather than from statutes or constitutions. Black's Law Dictionary 313 (9th ed. 2009).

I.G.2. General Maritime Law

Under Article III Section 2 of the U.S. Constitution, the United States Federal Courts have original jurisdiction¹⁹⁵ over admiralty and maritime laws matters.¹⁹⁶ A claim¹⁹⁷ arises under admiralty jurisdiction¹⁹⁸ if it occurred on navigable waters or when the injury on land was caused by or related to a vessel on navigable waters.¹⁹⁹ Bodies of water are considered navigable when they are “used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”²⁰⁰ In addition to occurring on navigable waters, the activity which was being performed must have “a substantial relationship to a traditional maritime activity.”²⁰¹ If a person were to be injured onboard a fishing vessel operating as a passenger vessel, the injured passenger would likely have a claim under admiralty jurisdiction against the vessel owner because the vessel was operating on the navigable waters of the United States, and carriage of passengers as well as commercial fishing is considered a *traditional maritime activity*.

I.G.3. Duty of Care Owed to Passengers

The courts have been unclear about what the duty of care²⁰² is that a vessel owner and operator owe to passengers onboard his/her vessel. The Supreme Court held in *Kermarec v.*

¹⁹⁵ Note: Original Jurisdiction: A court’s power to hear and decide a matter before any other court can review the matter. Black’s Law Dictionary 930 (9th ed. 2009).

¹⁹⁶ U.S. Const. art. III, § 2.

¹⁹⁷ Note: A Claim is a demand for money, property, or a legal remedy to which one asserts a right; especially, the part of the complaint in a civil action specifying what relief the plaintiff asks for. Black’s Law Dictionary 282 (9th ed. 2009).

¹⁹⁸ Note: Admiralty Jurisdiction means the exercise of authority over maritime cases by the U.S. district courts sitting in admiralty. Black’s Law Dictionary 53 (9th ed. 2009).

¹⁹⁹ *Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 531-34 (1995).

²⁰⁰ *The Daniel Ball* 77 U.S. 557, 563 (1870).

²⁰¹ *Great Lakes Dredge & Dock Co.*, *supra* note 201.

²⁰² Note: Duty of Care is “a legal obligation that is owed or due to another that needs to be satisfied.” Black’s Law Dictionary pg. 580.

Compagnie General Transatlantique that a vessel's owner, operating on navigable waters,²⁰³ owes a duty of reasonable care under the circumstances towards his/her passengers.²⁰⁴

Reasonable care is "the degree of care that a prudent and competent person engaged in the same line of business or endeavor would exercise under similar circumstances."²⁰⁵

Despite the Supreme Court ruling in *Kermarec* that the ordinary standard of reasonable care under the circumstances is the duty owed to passengers, lower courts have held that passenger vessel owners owe their passengers a "very high degree of care."^{206,207} In one First Circuit²⁰⁸ decision, the court examined what duty of care is owed to passengers onboard passenger vessels and determined that in certain situations the degree of reasonable care may be very high.²⁰⁹ However, "it is still a single duty of reasonable care" owed to passengers and courts could apply a standard of reasonable care.²¹⁰

Based on a duty of reasonable care owed to passengers, a vessel's owner may be found negligent if he/she failed to exercise this reasonable duty of care toward his/her passengers and failed to prevent an accident that a reasonable person could have prevented under the circumstances. An example would be driving a car during a snow storm. The reasonable person under the circumstances would slow down to an appropriate speed for the weather conditions. However, if that person failed to slow down and traveled at an excessive speed that causes an accident, then that person could possibly be found responsible for causing the accident because

²⁰³ Navigable Waters: Waters that are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. *Great Lakes Dredge & Dock Co, supra* note 201

²⁰⁴ *Kermarec v. Compagnie Generale Transatlantique* 358 U.S. 625, 632 (1959).

²⁰⁵ Black's Law Dictionary 240 (9th ed. 2009).

²⁰⁶ Note: A *very high degree of care* is "the degree of care exercised in a given situation by someone in the business or profession dealing with the situation. Black's law dictionary 240 (9th ed. 2009).

²⁰⁷ *Rios v. Phaidon Navegacion* 634 F. Supp. 479, 480 (D. P.R. 1985).

²⁰⁸ Note: Circuit is the judicial division of the United States, Maine is located within the First Circuit and is one of the thirteen circuits into which the U.S. federal courts of appeals are organized. Black's Law Dictionary 276 (9th ed. 2009).

²⁰⁹ *Muratore v. M/S Scotia Prince*, 656 F.Supp. 471, 478 (D. Me. 1987).

²¹⁰ *Id.*

he/she was not doing what a reasonable person would have done under the circumstances (i.e., slow down).

I.G.4. General Maritime Liability

Congress has established the owner and master of a vessel as well as the vessel itself are liable for any personal injury to passengers or their baggage if the injury or damage was caused by neglect²¹¹ or failure to comply with any statute regarding the inspection and regulation of vessels or manning requirements of a vessel.²¹² The owner and master of a vessel are also liable for any injury or damage to a passenger's baggage if it is caused by "a known defect in the steaming apparatus or hull of the vessel."²¹³ If a passenger's injuries were caused by any neglect and failure to comply with these regulations, or a known defect, then any liability imposed by the courts on the owner and master of a vessel, or the vessel itself, is not subject to any limitation of liability under the Limitation of Liability Act, which allows a vessel's owner to limit his/her liability to the value of the vessel.²¹⁴

The master of a vessel is liable for any personal injury or loss caused by the master's negligence or willful misconduct,²¹⁵ or his/her "neglect or refusal to obey the laws governing the navigation of vessels."²¹⁶ In general, injured passengers have three years to bring a civil action²¹⁷

²¹¹ Note: Neglect means the omission of proper attention to a person or thing, whether inadvertent, negligent, or willful; the act or condition of disregarding. Neglect is also defined as the failure to give the proper attention, supervision, or necessities, to such an extent that harm results or is likely to result. Black's Law Dictionary 1132 (9th ed. 2009).

²¹² 46 U.S.C.S. § 30102 (2012).

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Note: Willful Misconduct is misconduct committed voluntarily and intentionally. Black's Law Dictionary 1089 (9th ed. 2009).

²¹⁶ 46 U.S.C.S. § 30103 (2012).

²¹⁷ Note: A civil action is an action brought to enforce, redress, or protect a private or civil right; a noncriminal litigation also known as a lawsuit. Black's Law Dictionary 34 (9th ed. 2009).

for damages for any personal injury or death arising out of a maritime tort.²¹⁸ Congress has also extended maritime liability to injuries occurring on land where the injury or damage to the person or property was caused by a vessel on navigable waters.²¹⁹ Under this statute if a passenger is injured on land but the proximate cause²²⁰ of the injury was because of a vessel on navigable waters then the plaintiff may bring a maritime law claim.²²¹ An example of this may be when a person is injured on the dock while they are walking down to the vessel. The person was on the dock because he/she was going to board a vessel; therefore, he/she may be able to bring a suit under maritime jurisdiction under this statute in federal court.

I.G.5. Death on the High Seas Act

Congress has passed the Death on the High Seas Act, which allows the personal representative of a decedent²²² to bring a civil action against the person or vessel responsible when the death of the individual was caused by the wrongful act, neglect, or default²²³ and occurred beyond three nautical miles from the shores of the United States.²²⁴ If the injured individual brings a civil action in admiralty²²⁵ to recover for injuries caused by any wrongful or negligent act, and the individual dies while the action is pending as a result of the wrongful act or

²¹⁸ 46 U.S.C.S. § 30106 (2012).

²¹⁹ *Id.* § 30101 (2012).

²²⁰ Note: Proximate Cause: 1. A cause that is legally sufficient to result in liability; an act or omission that is considered in law to result in a consequence, so that liability can be imposed on the actor. 2. A cause that directly produces an event, and without which the event would not have occurred. Black's law dictionary 250 (9th ed. 2009).

²²¹ See *supra* note 220.

²²² Note: Decedent is a dead person. Black's Law Dictionary 465 (9th ed. 2009).

²²³ Note: Default means to be neglectful. Black's Law Dictionary 480 (9th ed. 2009).

²²⁴ 46 U.S.C.S. § 30302 (2012).

²²⁵ Note: A *civil action in admiralty* means any tort within the admiralty jurisdiction. Black's Law Dictionary 53 (9th ed. 2009).

negligence, then a personal representative may be substituted on behalf of the decedent and continue the action to recover damages.²²⁶

Death on the High Seas Act is only for the exclusive benefit of the decedent's spouse, parent, child, or relative.²²⁷ If a decedent's representative brings an admiralty claim under the statute, he/she is entitled to recover "fair compensation for the pecuniary loss sustained by the individuals for whose benefit the action is brought."²²⁸ If the decedent's negligence contributed to his/her death the courts shall consider the degree of negligence contributed by the decedent and reduce the amount of recovery accordingly.²²⁹ However, contributory negligence²³⁰ is not a complete bar to recovery for damages.²³¹ The total amount of compensation awarded shall be apportioned by the court between those individuals in proportion of the loss that each individual has sustained.²³²

The Death on the High Seas Act is not applicable to any deaths which occur from any wrongful or negligent acts that occurred while the vessel is within the territorial limits of a state or within three nautical miles from the coast.²³³ Therefore, if the decedent's injuries were the result of wrongful or negligent acts that occurred while the vessel was within the territorial waters of the state then a claim under DOHSA probably cannot be brought. In addition, the Act does not affect any state laws that regulate a right to recover for the death of an individual.²³⁴

²²⁶ 46 U.S.C.S. § 30305 (2012).

²²⁷ *Id.*

²²⁸ *Id.* § 30303.

²²⁹ *Id.* § 30304.

²³⁰ Note: Contributory negligence is when a plaintiff's own negligence played a part in causing the plaintiff's injury and that is significant enough to bar the plaintiff from recovering damages. Black's Law Dictionary 1134 (9th ed. 2009).

²³¹ See *supra* note 225.

²³² *Id.*

²³³ *Id.* § 30308 (2012).

²³⁴ *Id.*

I.G.6. Maine's Wrongful Death Statute

If a person was to die as a result of any negligent or wrongful acts on the part of the vessel's owner while the vessel is operating within Maine waters, then the deceased's estate could bring an action against the vessel's owner under Maine's wrongful death statute. If a person was to be seriously injured onboard a vessel caused by a wrongful act, neglect, or default—and would have brought an action against the vessel's owner—the deceased's estate may bring the action in the name of the personal representative of the estate.²³⁵

Any amount recovered in a wrongful death suit is for the exclusive benefit of the surviving spouse and any minor children to be shared equally between them; if there is no surviving spouse or minor children, then the money recovered shall be distributed to the deceased heirs.^{236,237} Maine's wrongful death statute allows a jury to award damages as it determines fair and just, and to compensate the estate for reasonable expenses of medical bills and funeral expenses. Juries are also allowed to award damages for loss of comfort and companionship of the deceased as well as punitive²³⁸ damages up to \$250,000. After the decedent's death there is a two-year statute of limitations²³⁹ for an estate to commence an action against a vessel's owner for the wrongful death of the individual.²⁴⁰

²³⁵ Me. Rev. Ann. tit. 18, § 2-804 (2011).

²³⁶ Note: Heirs means a person who, under the laws of intestacy, is entitled to receive an intestate decedent's property. Black's Law Dictionary 791 (9th ed. 2012). Intestate means of or relating to a person who has died without a valid will. Black's Law Dictionary 898 (9th ed. 2012).

²³⁷ See *supra* note 236.

²³⁸ Note: Punitive damages are damages awarded in addition to actual damages as a way of penalizing the wrongdoer or making an example to others when the defendant acted with recklessness, malice, or deceit. Black's Law Dictionary 448 (9th ed. 2009). If a person were to die because of a vessel owner's conscious disregard of a safety statute the jury may be able to award punitive damages in addition to being compensated for loss of companionship.

²³⁹ Note: Statute of limitations means a law that bars claims after a specified period. Black's Dictionary Law 1546 (9th ed. 2009).

²⁴⁰ See *supra* note 236.

I.G.7. Ways to Limit Liability

I.G.7.a. Marine Insurance

To be adequately protected against any causes of liability that could arise as a result of any injuries or damage of personal property, a vessel's owner would probably want to obtain adequate liability insurance for any claims brought against him/her by an injured passenger. There are many different types of marine insurance to cover every type of lawful marine adventure, including: hull insurance, crew insurance, insurance on a vessel's cargo, and insurance towards any third party liability (also known as Protection and Indemnity [P&I] insurance). P&I insurance coverage was developed to cover the liabilities that are generally not covered, or only partially covered, by the standard hull insurance policy.²⁴¹ P&I insurance is the primary policy for maritime third-party liability and covers the liability of a vessel's owner for the loss of life and personal injury to any passengers or crew onboard the vessel, as well as persons injured onshore as a result of the negligence of the vessel or its crew.²⁴² P&I insurance coverage is similar to a person's liability insurance related to his/her car insurance.²⁴³

It is difficult to determine what operational requirements and restrictions an insurance underwriter would impose on a vessel's owner to be eligible for liability insurance, or exactly how much P&I insurance coverage would cost a vessel's owner, because such determinations are specific to the vessel and crew. However, there are several suggestions²⁴⁴ that a vessel's owner would want to consider to ensure that he/she has adequate insurance to cover his/her liability as

²⁴¹ Leslie J. Buglass, *Marine Insurance and General Average in the United States* 386 (Cornell Maritime Press 1991) (1973).

²⁴² *Id.* At 389.

²⁴³ *Id.*

²⁴⁴ Information on marine insurance was provided by Bob Falvey, General Counsel for Favley Cargo Underwriters, and Shawn Kucharski, an insurance underwriter for Falvey Yachts. These comments were meant to give vessel owners some guidance when shopping for marine insurance and offer some insight as to what marine insurance carriers will be looking at when determining how much of a premium the carrier would charge a vessel owner for liability coverage.

well as minimize the cost of the insurance premiums that he/she would likely pay. In general, a vessel's owner would want to have at minimum a P&I policy coverage as well as an umbrella policy of at least \$1,000,000 for any liability towards third parties.²⁴⁵ A vessel's owner would also want to get umbrella insurance in addition to a P&I insurance policy, because umbrella insurance typically "covers the losses that exceed the basic or usual limits of liability provided by other policies."²⁴⁶

The initial premiums for a P&I and umbrella policy will likely be high because of the unique nature of carrying PFH on commercial fishing vessels, and the unknown risks that the insurance underwriter could face. However, as time goes on and insurance providers become familiar with this type of passenger vessel operation premiums should begin to decrease.²⁴⁷

There are three areas that insurance providers will typically want to evaluate to determine the types of risk involved in a passenger vessel operation:

- what occurs prior to the vessel leaving the dock
- what risk reduction plans are in place
- what plans are in place if an incident does occur.²⁴⁸

In evaluating and limiting the risks of insuring a commercial fishing vessel carrying PFH, an insurance provider will want to see that there is some type of safety drill and a waiver signed prior to the vessel leaving the dock. Waivers are generally void; however, it will help in a liability proceeding to show that the plaintiff was given a well-drafted document informing him/her of all the possible risks associated with the type of operation, and it would also possibly help limit some of the liability to which the vessel's owner could be exposed. In addition to

²⁴⁵ Note: Information provided by Shawn Kucharski.

²⁴⁶ *Black's*, *supra* note 207 at 878.

²⁴⁷ See *supra* note 246.

²⁴⁸ *Id.*

having passengers sign a waiver an insurance provider will also be looking at what types of safety instructions and drills are given to passengers that inform them of:

- what to expect during the tour
- where all the safety equipment is located
- what passengers can and cannot do while onboard the vessel.

It would also be helpful to incorporate in the waiver a provision documenting that such instructions were given to the passengers prior to the vessel leaving the dock, and that the passenger acknowledges that he/she understood the instructions by signing the waiver.²⁴⁹

During the actual operation of the vessel an insurance provider will look at what types of safeguards and risk management plans are in place during the operation of the vessel. Such safeguards include the ratio of crew members to passengers, and the number of crew members that are dedicated only to the management and safety of the passengers (not engaging in the commercial fishing operations). The number of crew onboard the vessel that the insurance provider may require might exceed the number of crew members required under the vessel's COI. An insurance carrier may also require additional safety requirements under the terms of the insurance policy and impose stricter safety requirements than what is actually required by law.²⁵⁰

In addition to the ratio of passengers to crew an insurance provider may also look at where the passenger-designated areas are located on board the vessel with respect to any dangerous equipment that could potentially cause passengers bodily harm, as well as what types of safeguards are in place to prevent passengers from going into these dangerous areas. Such safeguards can include lines on the deck showing "off limits" areas, or actual barriers in place preventing passengers from going into areas where they could potentially get hurt. There should

²⁴⁹ *Id.*

²⁵⁰ *Id.*

also be guidelines in place to follow if the vessel experiences inclement weather, such as when to return to port and where passengers should go if the weather gets dangerous.²⁵¹

An insurance provider will want to know what types of guidelines and safety instructions are in place if someone does get injured while onboard the vessel. These guidelines will show that if an injury does arise the crew will know what to do, and will demonstrate that the crew is in control of the situation.

An example of such a guideline would be having a proper first-aid kit onboard the vessel, which is also required when a vessel receives their COI. There should also be documentation of any medical training that members of the crew have received, and documentation that crew members are familiar with first-aid and can properly treat injuries and stabilize a situation while the vessel is returning to port. There should be guidelines in place to ensure that the proper authorities are notified immediately of any incidents, and that medical professionals will be waiting for the vessel's return to the dock.²⁵² The Coast Guard also requires that vessel owners must report any death or injuries which occur onboard their vessel within 48 hours of the injury or death.²⁵³

As previously stated, what would be required by an insurance provider is specific to that individual provider, for that individual vessel. However, these recommendations should help reduce the costs of insurance premiums that a vessel owner can expect to pay, as well as reduce the owner's risk of liability towards his/her passengers. To be properly protected from liability a vessel owner should consult with a P&I and umbrella insurance provider about his/her specific passenger vessel operation, and implement any requirements that the insurance providers may impose as terms of insurance coverage.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ 33 C.F.R. § 173.55 (2012).

I.G.7.b. Passenger Boarding Document

It is recommended that the owner of a commercial fishing vessel who wishes to take passengers out for hire on fishing demonstrations and tours have a simple and clear one page document drafted by a lawyer familiar with maritime law that discusses and documents:

- the safety provisions of the vessel
- what passengers can expect onboard
- a vessel owner's waiver of liability
- a forum selection clause.

I.G.7.b.i. Waivers of Liability

Congress has specifically passed a statute that says that passenger vessel owners and operators that carry passengers within the United States cannot create contracts limiting a vessel owner's and operator's liability for personal injuries caused by negligence.²⁵⁴ As a result of this statute, owners of passenger vessels transporting passengers between ports in the United States who have their passengers sign contracts that would limit the liability of the owner for any personal injuries or death caused by the negligence or fault of the owner should know that such contracts are void.²⁵⁵ Courts have routinely applied this statute and have held passenger vessel waivers of liability clauses void, and have imposed liability on vessel owners. In *Johnson v. Royal Caribbean Cruises, LTD*, a recent Eleventh Circuit decision published in December 2011, the Appeals Court²⁵⁶ held that the "statute is clear and unambiguous"²⁵⁷ and leaves the court no room for interpreting what was Congress' intent or purpose of the statute based on the legislative

²⁵⁴ 46 U.S.C.S. § 30509 (2012).

²⁵⁵ *Id.*

²⁵⁶ Note: Appeals Court is a court with jurisdiction to review decisions of lower courts or administrative agencies. Black's Law Dictionary 405 (9th ed. 2009).

²⁵⁷ Note: Ambiguous means an uncertainty of meaning or intention, as in a contractual term or statutory provision. Black's Law Dictionary 93 (9th ed. 2009).

history²⁵⁸ of the statute.²⁵⁹ In *Johnson*, the court held that “Congress has spoken on this very type of waiver and has unequivocally prohibited it and rendered it void.”²⁶⁰

Despite Congress and the courts voiding passenger vessel owners’ attempts at limiting their liability, the owner of a commercial fishing vessel should probably have an attorney draft a clear and concise reasonable waiver of liability. A waiver of liability could contain important information such as documentation that the passenger was informed of all the possible dangers associated with being onboard a commercial fishing vessel, and where the passengers can and cannot go onboard the vessel. These waivers could also document that the passengers have been instructed by the vessel’s crew on vessel safety and where all the safety equipment is located. A vessel owner may not be able to eliminate his/her liability to passengers; however, a waiver of liability document, carefully drafted and clearly containing the information discussed, could help limit a vessel owner’s liability and show that passengers have received actual notice²⁶¹ of the dangers that could be encountered while onboard the vessel.

I.G.7.b.ii. Forum Selection Clause

A forum selection clause is “a contractual provision in which the parties establish the place (such as the country, state, or type of court) for specified litigation between them.”²⁶² In 1991, the Supreme Court held in *Carnival Cruise Lines v. Shute* that forum selection clauses contained within passenger boarding ticket agreements are valid. Since *Shute*, most cruise lines have adopted some type of forum selection within their boarding ticket contracts.²⁶³ In holding

²⁵⁸ Note: The legislative history is the background and events leading to the enactment of a statute, including hearings, committee reports, and floor debates. The legislative history is sometimes used by courts to interpret what was a legislature’s intent when passing a statute that is ambiguous. Black’s Law Dictionary 838 (9th ed. 2009).

²⁵⁹ *Johnson v. Royal Caribbean Cruises, LTD.*, 449 Fed. Appx. 846, 847 (11th Cir. Fla. 2011).

²⁶⁰ *Id.*

²⁶¹ Note: Actual notice is notice given directly to, or received personally by a party. Black’s Law Dictionary 1164 (9th ed. 2009).

²⁶² *Black’s*, *supra* note 207 at 726.

²⁶³ *Carnival Cruise Lines, Inc. v. Shute* 499 U.S. 585 (1991).

forum selection clauses valid, the Supreme Court found that that because a cruise ship carries passengers from many different locations, cruise lines have a special interest in limiting the forums in which they could potentially be subject to suit.²⁶⁴ By limiting the forums in which a cruise line could be sued judicial resources are conserved, and this benefit is passed onto passengers in the form of reduced fares.²⁶⁵ Forum selection clauses are subject to judicial scrutiny for fundamental fairness; however, the Court in *Shute* held that any thought of a bad faith motive is offset by the fact that Carnival's principal place of business²⁶⁶ is located in Florida, and many of their vessels depart from Florida as well.²⁶⁷

Based on the Supreme Court's holding in *Shute*, a commercial fishing vessel that wishes to carry passengers for hire could possibly include a forum selection clause that states on the passenger's initial boarding document that should any personal injury arise; suit must be brought in Maine. This would probably satisfy the Court's reasoning in *Shute* because this would benefit the vessel owner who is looking to transport tourists who are visiting Maine from various parts of the world. Without a forum selection clause, vessel owners could potentially be subject to suit in multiple forums. A forum selection clause would also reduce the costs of litigation should an incident occur that would need to be litigated at trial. Because of these lower litigation costs the fare of a passenger ticket could be reduced. In addition, a forum selection clause would probably be fair because the vessel's principle place of business as well as where the vessel leaves and returns to port would probably be exclusively in Maine.

²⁶⁴ *Id.* at 594.

²⁶⁵ *Id.*

²⁶⁶ Note: The principal place of business is the place of a corporation's chief executive offices, which is typically viewed as the "nerve center." Black's Law Dictionary 1266 (9th ed. 2009).

²⁶⁷ *Carnival*, 499 U.S. at 633.

I.G.7.c. Limitation of Liability Act

The Limitation of Liability Act (LLA) passed by Congress in 1851 allows the owner of a vessel to limit his/her liability to the value of the vessel for any claim arising from injury, loss, or destruction of any property or goods incurred without the knowledge of the owner.²⁶⁸ LLA applies to sea-going vessels; however, there is a list of vessels to which the LLA does not apply, including fishing vessels.²⁶⁹ However, the statute is silent about applying to commercial fishing vessels that are carrying PFH; therefore, the owner of a commercial fishing vessel that was carrying PFH may be able to limit his/her liability under the LLA. The LLA applies when a vessel's owner hires a master to run the vessel independent of the owner. If the owner of the vessel is also the master of the vessel, then the owner cannot limit his/her liability under the LLA.²⁷⁰ Therefore, if the owner of the vessel is also the vessel's master while there is an injury onboard the vessel, then the vessel owner cannot limit his/her liability under the LLA.

The LLA allows the owner of a vessel that is operated by a master independently of the owner to limit his/her liability to the fair market value of the vessel. However, if the value of the vessel is insufficient to pay all the losses in full, and the loss amount is less than 420 times the tonnage of the vessel, then liability costs shall increase to 420 times the tonnage of the vessel and shall only be used to pay claims for personal injury or death.²⁷¹ For example, if the vessel is 100 tons, then the amount of liability that the owner of the vessel is liable for under the statute is approximately \$42,000. If the amount of liability is still insufficient to satisfy any personal injury or death claims against the owner of a vessel, then all claims shall be paid in proportion to their respective losses. The proportions would depend on the extent of the injuries of that specific

²⁶⁸ 46 U.S.C.S. § 30505 (2012).

²⁶⁹ *Id.* § 30506.

²⁷⁰ *Id.* § 30512.

²⁷¹ See *supra* note 270.

individual versus other claimants, relative to the amount based on the FMV of the vessel or the amount determined by the tonnage of the vessel.²⁷²

When there is a claim brought against the owner of a vessel the owner of the vessel then has six months, upon receiving written notice of the claim, to bring a civil action in district court²⁷³ of the United States to limit his/her liability.²⁷⁴ When the vessel owner brings a cause of action under LLA the owner has the option to create a fund for the benefit of the claimants and either deposit with the court or a trustee appointed by the court, an “amount equal to the value of the owner’s interest in the vessel and pending freight, or approved security.”²⁷⁵ When an LLA action has been brought by the owner and a fund on behalf of all claimants has been created then “all claims and proceedings against the owner related to the matter in question shall cease.”²⁷⁶

Section II: Aquaculture Farms

II.A. Introduction

This section concentrates on the legal and liability issues that aquaculture operators will face when having tourists visit their farms. It examines general legal principles regarding land ownership and the duties a land owner owes to the various visitors coming to their land. In addition it will examine food safety concerns and bio-security issues.

²⁷² 46 U.S.C.S. § 30507 (2012).

²⁷³ Note: District court means a trial court having general jurisdiction within its judicial district. Black’s Law Dictionary 407 (9th ed. 2009).

²⁷⁴ 46 U.S.C.S. § 30511 (2012).

²⁷⁵ *Id.*

²⁷⁶ *Id.*

II.B. Owner Liability to Visitors

II.B.1. Duty of Care

This section discusses legal principles and applies them to a broad audience. It explores various aquaculture farms, such as those farms that are connected to the dry land by a dock, as well as those aquaculture farms that are made up of floating platforms positioned away from the shore that are only accessed via vessel. Because the types of aquaculture farms vary it is difficult to determine exactly what duty of care an owner has to tourists visiting his/her aquaculture farms, such as: whether the duty is based on the traditional classifications of the “guest” that visits the property, or whether the duty of care would be a reasonable duty of care similar to what a vessel owner owes to his/her passengers.

Traditionally, the duty of care a land owner owes to those who are on his/her property depends on the classification of visitor. In tort law, there are three classifications of persons on a person’s land:²⁷⁷

- (1) *Trespassers*: A trespasser is a person who “intentionally and without consent or privilege enters another’s property.”²⁷⁸ Generally, a property owner owes no duty of care to an unforeseeable²⁷⁹ trespasser.²⁸⁰
- (2) *Licensees*: Licensees are people who are on a landowner’s property with the owner’s permission but do not provide any benefit to a landowner.²⁸¹ Landowners owe a duty of care to licensees to notify the licensee of any hidden dangers on the property, as well as to not act

²⁷⁷ The National Agricultural Law Center, Land Owner Liability: An Overview, *available at*: <http://www.nationalaglawcenter.org/assets/overviews/landownerliability.html> [hereinafter *Land Owner Liability Overview*].

²⁷⁸ *Black’s*, *supra* note 207 at 1643.

²⁷⁹ Note: Unforeseeable means not foreseen; not expected. *Black’s Law Dictionary* 1667 (9th ed. 2009).

²⁸⁰ *Landowner liability Overview*, *supra* note 278.

²⁸¹ *Id.*

in a way that could possibly cause harm to the licensee.²⁸² An example of a licensee would be a hunter who has permission to hunt on a property owner's land.

(3) *Invitees*: Invitees are those people who have the landowner's permission to be on the land for the land owner's benefit, such as people paying to pick their own pumpkins at "you pick" farms.²⁸³ Landowners have a duty to make their land reasonably safe and as well as a duty to warn all invitees about any potential dangers that are on their property.²⁸⁴

There are some jurisdictions that have shifted from the traditional duty of care owed to a person on land, depending on their classification, to a general duty of reasonable care owed under all circumstances.²⁸⁵ In determining landowner liability courts use several factors, including: "the risk of injury, benefits of the condition, and the burdens to safeguard the condition."²⁸⁶ Maine is a jurisdiction that has adopted a duty of reasonable care owed to occupiers of property. In Maine, a business owner owes a positive duty of exercising reasonable care in providing reasonably safe premises when he/she knows or should have known of a risk to customers on its premises."²⁸⁷

The duty of reasonable care described above would be applied to the landowner of farms and businesses located on dry land. The problem with aquaculture farms is that they usually require some type of structure such as a dock or pier that is connected to land; and structures that are either anchored, floating, or built atop of pilings and require some type of boat to access them. There appears to be no cases decided in Maine where the court looked at and determined what the standard of care would be for dock and pier owners to a person using that land.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Patterson v. United States of America*, 599 F.Supp.2d 34, 40 (D. M.E. 2009).

However, there are a number of cases from other states that held that the owner of a pier has a duty to those who use that pier to keep the pier in a “safe condition so that it might be used without the risk of injury.”²⁸⁸ It appears from the cases that an aquaculture operator’s aquaculture farm, where the farm is next to a shore and is made up of a series of docks and piers, probably owes a duty of reasonable care of keeping the piers and docks in a safe condition to all the tourists who visit his/her aquaculture farm.

The duty of care an aquaculture operator owes to visitors when his/her aquaculture farm is established on floating docks and fixed platforms and a vessel is required to access the farm is more difficult to determine than if the aquaculture farm was attached to the shore. This is because there is a question of whether a claim could be brought in admiralty jurisdiction. As discussed above, a claim arises under admiralty jurisdiction if it occurred on navigable waters, or when the injury on land was caused by or related to a vessel on navigable waters.²⁸⁹ Bodies of water are considered navigable when they are “used, or are susceptible of being used, in [their] ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”²⁹⁰ In addition to occurring on navigable waters, the activity that was being performed must have “a substantial relationship to a traditional maritime activity.”²⁹¹ There are two issues that arise when determining whether claims could be brought in admiralty jurisdiction for injuries at aquaculture farms: (1) determining whether a floating platform would be considered a vessel for the purposes of

²⁸⁸ *Stinson v. Edgewater Saw Mills Company* 123 N.Y.S. 745, 746 (N.Y. App. Div. 1910). See also *Hardesty v. Rossi* 1995 U.S. Dist. LEXIS 18466 (D. Md. 1995); *Strong v. Seattle Stevedore Company* 466 P.2d 545 (Wash. Ct. App. 1970) & *Anderson v. Iceland Steamship Company* 585 F.2d 1142 (1st Cir. 1978).

²⁸⁹ *Great Lakes Dredge & Dock Co*, *supra* note 201.

²⁹⁰ *Daniel Ball*, *supra* note 202.

²⁹¹ *Great Lakes Dredge & Dock Co*, *supra* note 201.

admiralty jurisdiction; and (2) whether aquaculture farming is considered a traditional maritime activity.

Congress has defined that a “vessel includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.”²⁹² This definition is extremely broad; however, the Supreme Court in *Steward v. Dutra Construction Company* determined that dredge platforms are vessels because they have the “capacity to be navigated in and upon the waters.”²⁹³ The Court determined that even though the statute says a watercraft needs to be used as a means of transportation over water, the statute does not require that transportation over water be the primary purpose of the watercraft.²⁹⁴ Other courts have held that floating, movable jack-up drilling rigs are vessels.²⁹⁵ The fifth circuit held that work platforms are not vessels when: (1) the platform is not moved for several years; (2) there is an elaborate system securing the platform to the ocean floor which would be expensive and difficult to remove to enable to movement of the platform; and (3) there is very limited movement on the platform.²⁹⁶

When determining whether aquaculture farming is related to a traditional maritime activity, the reviewing court is likely to apply the two-part test that the Supreme Court created in *Grubart v. Great Lakes Dredge & Dock Co.* The Court held when a reviewing court is determining whether an activity is related to a traditional maritime activity, that court must: (1) determine whether the incident has the potential to disrupt maritime commerce; (2) determine

²⁹² 1 U.S.C.S. § 3 (2012).

²⁹³ *Steward v. Dutra Construction Company* 543 U.S. 481, 491 (2005).

²⁹⁴ *Id.*

²⁹⁵ *Marathon Pipe Line Co. v. Drilling Rig Rowan/Odessa* 761 F.2d 229, 233 (5th Cir. 1985).

²⁹⁶ *Fields v. Pool Offshore, Inc.*, 182 F.3d 353 (5th Cir. 1999).

whether the general character of the activity which gave rise to the incident is substantially related to a traditional maritime activity.²⁹⁷

When determining whether an aquaculture farm is a vessel and what the standard of care owed to visitors of that site may be, the courts will inquire about the ease at which the aquaculture farm structures can be moved about, or whether the farm is permanently anchored to the seabed and not easily moved. One factor would be whether the platforms that make up the aquaculture farm are moved about seasonally when the waters freeze over.

When determining whether aquaculture farming is related to a traditional maritime activity, a person could argue that the general character of the activity of an aquaculture farm is to engage in fishing, which would probably be found by the courts to be related to a traditional maritime activity. For the above reasons it is difficult to determine whether the duty of care that a vessel owner owes to his/her passengers would be the same duty of care that an aquaculture operator owes to his/her guests when the aquaculture farm is located offshore. Generally it would probably be a reasonable standard of care under the circumstances.

II.B.2. Recreational Use Statutes

Many states have begun to pass recreational use statutes that protect landowner liability from persons who are injured while on their land as a result of landowner negligence. Maine's legislature has passed one of these statutes, which limits a landowner's liability to those who have permission to use his/her land for recreational uses.²⁹⁸ Under the statute, the owner of land "does not have a duty of care to keep the premises safe for entry or use by others for recreational or

²⁹⁷ *Great Lakes Dredge Dock Co.*, *supra* note 201.

²⁹⁸ Me. Rev. Ann. tit. 14, § 159-A (2011).

harvesting activities or to give warning of any hazardous condition, use, structure or activity on [the] premises.”²⁹⁹

This statute applies only to recreational activities defined under the statute, including but not limited to:

- hunting
- fishing
- trapping
- environmental education and research or
- activities involving the harvesting or gathering of forest, field, or marine products.³⁰⁰

However, recreational activities under the statute do not include commercial agricultural or timber harvesting.³⁰¹ In addition, the statute does not apply when permission to use the land was granted in exchange for consideration³⁰² paid and the premises are used primarily for commercial recreational purposes.³⁰³ Visits to aquaculture farms would qualify under the statute’s definition of recreational activities because these activities would probably be considered environmental education and research. Because the tourists would be paying to visit the facilities it is doubtful that landowners would be able to limit their liability because use of their property is granted in exchange for consideration; additionally, the facility would probably be considered an area that is used primarily for a commercial recreational purpose.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² Note: Consideration means an economic benefit, inducement, right, or profit including payment accruing to an individual, person, or entity. 46 U.S.C.S. § 2101(5a) (2012).

³⁰³ *Dutra Construction*, *supra* note 295.

II.C. The Use of Passenger Vessels on Aquaculture Farms

If an aquaculture farm is located offshore and requires a vessel to access the facility, then aquaculture operators have two possible options that would enable passengers to gain access to their facilities. First, aquaculture operators could purchase a small passenger vessel to transport visitors to the aquaculture farm. If an aquaculture operator wishes to take this course of action then he/she would need to comply with the regulations discussed above for passenger vessels, such as hiring a licensed captain who holds the proper Coast Guard license for the size of vessel used and number of passengers carried. In addition to hiring a licensed captain, depending on the number of passengers carried onboard the vessel the aquaculture operator may need to: have the vessel inspected, be issued a COI, and comply with the necessary small passenger vessel inspection requirements. Second, an aquaculture operator could create an arrangement with a commercial fisherman or other type of tour boat to drop passengers off at the aquaculture facility.

Depending on the option that the aquaculture operator chooses, he/she would want to limit his/her liability as much as possible, including complying with all the necessary regulations for a passenger vessel. If the aquaculture operator wishes to partner with a commercial fisherman or other operator of a vessel carrying passengers for hire, then both the aquaculture operator and the vessel owner should retain an attorney to draft a partnership agreement documenting who is liable for any injuries that may occur and when, so that each party can properly protect his/her interests should an incident occur.

II.D. Bio-security

Bio-security is “the protection of fish or shellfish from infections (viral, bacterial, fungal, or parasitic) agents.”³⁰⁴ The terrorist attacks on September 11, 2001 increased concern about the vulnerabilities to United States’ agriculture and food industries to a possible terrorist attack. As a result of these attacks, numerous agencies now have various responsibilities related to maintaining the security of the United States’ agriculture.³⁰⁵ These agencies include the Food and Drug Administration, Department of Agriculture, and Department of Homeland Security. The goals of an aquaculture bio-security program are to “reduce the risk of disease introduction, minimize spread on-farm or to other new areas, promote fish health, protect fish health, protect economic investment and reputation, protect against new diseases, and to protect human health.”³⁰⁶

A good bio-security program develops methods that prevent the possible entrance of pathogens into an aquaculture facility. A bio-security program is customized to that specific aquaculture farm; when developing a plan an aquaculture operator must identify safety hazards such as how diseases could spread and the risk factors to that individual farm. The aquaculture operator must assess these risks and determine what bio-security measures are needed.³⁰⁷ One major risk to an aquaculture farm is visitors who could carry any possible pathogens into the aquaculture facility.

³⁰⁴ Abraham Joseph, Biosecurity for Aquaculture Facilities, *available at*: http://www.europharma.cl/index2.php?option=com_docman&task=doc_view&gid=1&Itemid=24.

³⁰⁵ The National Agricultural Law Center, Agriculture Biosecurity – An Overview, *available at*: <http://www.nationalaglawcenter.org/assets/overviews/biosecurity.html>.

³⁰⁶ Rend Lake Workshop, Biosecurity for Aquaculture Facilities (2010), *available at*: <http://fishdata.siu.edu/secure/biopres.pdf>.

³⁰⁷ *Id.*

A proper bio-security plan should include implementing programs to prevent any visitors from entering the farm who might possibly carry foreign pathogens into the aquaculture facility. Examples of programs that would help minimize the possible introduction of foreign pathogens into an aquaculture facility include:

- posting signs and notices to all visitors
- maintaining a visitor log
- using foot dip baths to disinfect shoes
- having all visitors accompanied by farm personnel at all times
- having visitors avoid direct contact with the animals.³⁰⁸

Implementing programs like this should minimize the risks of foreign pathogens introduced by visitors to an aquaculture facility.

II.E. Aquaculture Insurance

Aquaculture insurance includes all the various types of insurance that an aquaculture operator would want to have to protect his/her aquaculture business from liability.³⁰⁹ A large aquaculture company would want insurance protection for its buildings and equipment, employees, stock, livestock, third parties, motor vehicles, vessels and divers, any goods that are in transit, and other insurable interests.³¹⁰ Aquaculture insurance is a type of property insurance, similar to a person's home owner's insurance, which protects the policy holder from any loss or damage to his/her property. Aquaculture insurance is not liability insurance, which would cover

³⁰⁸ *Id.*

³⁰⁹ FAO Fisheries Technical Paper, Guidelines to Meet Insurance and Other Risk Management Needs in Developing Aquaculture in Asia, P.A.D. Secretan, Aquaculture insurance 53, available at: http://books.google.com/books?id=XoGxmeFecvgC&pg=PA53&lpg=PA53&dq=P.A.D.+Secretan,+Aquaculture+insurance&source=bl&ots=pRZ4hZQFZK&sig=E3JHi7CqwtIH6XwqZpTN-0W2imM&hl=en&sa=X&ei=ke6pT7XCKeaY6AGl_uWiBA&ved=0CFMQ6AEwAA#v=onepage&q=P.A.D.%20Secretan%20Aquaculture%20insurance&f=false [hereinafter *Aquaculture Insurance*].

³¹⁰ *Id.*

the liability that an aquaculture facility owner would incur should a visitor to his/her facility be injured.³¹¹ Because of this, in addition to aquaculture insurance protecting facilities and fish stocks, an aquaculture operator who wants to open up his/her facilities to the public should also acquire third party liability insurance (also known as an umbrella policy)³¹² to protect his/her interests.

An aquaculture company would probably want to obtain coverage for all of the above listed items; however, this section focuses primarily on third party liability. Aquaculture facilities should maintain a safe and clean facility to help reduce the possibility of any injuries that a member of the public might sustain while visiting the aquaculture farm. In addition to obtaining adequate liability insurance and maintaining a clean and safe facility, an aquaculture owner/operator should regularly inspect his/her property for any dangerous conditions, document these inspections, and eliminate any dangerous conditions found.³¹³ Signs should be posted throughout the facility providing warnings of any dangerous conditions and designating secured areas not open to the public.³¹⁴ All employees should be trained so they recognize a possible dangerous condition. The operation should have a written plan for treating any possible injuries, and documenting all injuries if such were to occur.³¹⁵

³¹¹ *Id.* at 129.

³¹² Note: An umbrella policy is an insurance policy which covers losses that exceed the basic or usual limits of liability provided by other policies. Black's Law Dictionary 878 (9th ed. 2009).

³¹³ Pickyourown.org, PYO and Agri-Tourism Liability and Insurance Issues for Farmers, *available at*: http://www.pickyourown.org/resources_liabilityissues.htm.

³¹⁴ *Id.*

³¹⁵ *Id.*

Section III: Business Organizations

III. A. Introduction

Many types of business structures offer the flexibility to fit the needs of an individual's business activities. These business structures range from simple sole proprietorships and partnerships (both of which are informal but allow a business venture the opportunity to develop and grow), to more formal complex business structures such as limited liability companies and corporations. The most fundamental reason that persons engaging in a business venture form a business entity is to protect themselves and their investors from any legal liabilities which may occur during the course of business.³¹⁶ The amount of liability a business owner and/or investor is possibly exposed to is dependent on how that business is organized.³¹⁷ In addition to determining liability, the type of business structure formed also determines the types of taxes that the business organization, its owners and investors, are subject to.³¹⁸

III.B. Types of Business Organizations

III.B.1. Sole Proprietorship

A sole proprietorship is “a business in which one person owns all the assets, owes all the liabilities, and operates in his or her personal capacity.”³¹⁹ A sole proprietorship is the simplest type of business structure and does not need any formal registration with the state.³²⁰ Because there is no formal organization required to form a sole proprietorship, essentially the owner of the business is the business; and the owner of the sole proprietorship would be personally liable

³¹⁶ The National Agricultural Law Center, Business Organizations – An Overview, *available at*: <http://www.nationalaglawcenter.org/assets/overviews/businessorganizations.html>.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Black's, supra* note 207 at 1520.

³²⁰ Rusty Rumley, The National Agricultural Law Center, Business Organizations Reading Room: Sole Proprietorships, *available at*: <http://www.nationalaglawcenter.org/assets/readingrooms/businessorgs-sole.pdf>.

for the actions of the business.³²¹ If the individual creates a business operation without any formal organization or filing with the state, then that person has created a sole proprietorship. For tax purposes, the business is ignored and the owner of the sole proprietorship is personally liable to pay all the taxes on the income of the business. Typically they also have the ability to deduct any expenses of the business.³²²

III.B.2. General Partnership

A general partnership is “a partnership in which all partners participate fully in running the business and share equally in the profits and losses.”³²³ A general partnership is similar to a sole proprietorship; however, instead of one person creating the business, two or more individuals create the business.³²⁴ General partnerships do not require the filing of any business documents, and each of the partners is expected to share in both the profits and losses of the business.³²⁵ It is simple to form a partnership because there are no requirements to file any documents creating the partnership, and courts have held that a partnership exists “when two or more individuals [are] involved in a common enterprise (business) and share the profit.”³²⁶ Because the partners share in the losses of the business, they are each personally liable for the actions and debts that are created on behalf of the partnership.³²⁷ When a partner is acting on behalf of the partnership, then that partner has the ability to legally “bind the other partners and the partnership itself to a contract and expose both the partnership and the partners to civil or

³²¹ *Id.*

³²² *Id.*

³²³ *Black's, supra* note 207 at 1230.

³²⁴ Rusty Rumley, The National Agricultural Law Center, Business Organizations Reading Room: General Partnerships, *available at*: <http://www.nationalaglawcenter.org/assets/readingrooms/businessorgs-general.pdf>.

³²⁵ Me. Rev. Ann. tit. 31, § 1022 (2011).

³²⁶ *Id.*

³²⁷ *Id.*

criminal liability.”³²⁸ Generally, the partners in a general partnership share the profits of the partnership equally, and they are usually taxed equally unless there is a partnership agreement that states otherwise.³²⁹

III.B.3. Limited Partnership

A limited partnership is a partnership composed of one or more general partners, who control the business and are personally liable for the partnership’s debts, and one or more limited partners who contribute capital and share profits, but who cannot manage the business and are liable only for the amount of their investments.³³⁰ In order to form a limited partnership, a certificate of limited partnership must be filed with the Secretary of State.³³¹ The certificate of limited partnership should contain the name of the limited partnership, and contain: the designation “limited partnership” or “L.P.,” the address of each general partner, whether partnership is a limited liability partnership, and any other possible required information depending on the type of limited partnership being formed.³³² In limited partnerships typically the limited partner is an investor in the partnership and has little or no control over the operation of the business.³³³ Limited partners do not have the power to bind the limited partnership like a partner in a general partnership does.³³⁴ In a limited partnership, the limited partner is not personally liable for any action arising from the activities of the limited partnership.³³⁵ Typically, the partners in a limited partnership are taxed based on the profits or losses of the partnership according to their individual ownership interests within the partnership.³³⁶

³²⁸ *Id.* § 1033.

³²⁹ *Id.*

³³⁰ *Black’s, supra* note 207 at 1230.

³³¹ Me. Rev. Ann. tit. 31, § 1321.

³³² *Id.*

³³³ See *supra* note 326.

³³⁴ Me. Rev. Ann. tit. 31, § 1342 (2011).

³³⁵ *Id.* § 1343.

³³⁶ Rusty Rumley, The National Agricultural Law Center, Business Organizations Reading Room:

III.B.4. Limited Liability Partnership

A limited liability partnership is “a partnership in which a partner is not responsible for acts committed by another partner or employee which is not under that partner’s supervision.”³³⁷

In order to form a limited liability partnership, a certificate of limited liability partnership must be filed with the Secretary of State.³³⁸ The certificate of limited liability partnership should:

- contain the name of the limited liability partnership
- include the designation that the business is a limited liability partnership
- include the address of the contact partner and the address of the partnership’s place of business
- include other possible information required for the formation of that individual limited liability partnership.³³⁹

Typically, limited liability partnerships are formed by professionals, such as attorneys or accountants.³⁴⁰ Within these organizations the partners typically share office space and staff; however, the partners do not want to be liable for the actions of their partners.³⁴¹ Limited liability partnerships are taxed like general partnerships and the partners will be taxed equally.³⁴²

III.B.5. Corporation

Corporations are one of the oldest types of business organizations established to protect the investors of a company from being held personally liable for the actions of the corporation.³⁴³

There are two types of corporations: *C. Corporations*, which are the traditional type of

The Limited Partnerships, *available at*: <http://www.nationalaglawcenter.org/assets/readingrooms/businessorgs-limited.pdf>.

³³⁷ Rusty Rumley, The National Agricultural Law Center, Business Organizations Reading Room: Limited Liability Partnerships *available at*: <http://www.nationalaglawcenter.org/assets/readingrooms/businessorgs-llp.pdf>.

³³⁸ Me. Rev. Ann. tit. 31, § 822 (2011).

³³⁹ *Id.*

³⁴⁰ See *supra* note 342.

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ See *supra* note 318.

corporation, and *S. Corporations*. The difference between these two corporations is how they are taxed. *C. Corporations* are taxed twice: the income generated by the corporation is taxed, and then when the income of the corporation is distributed to the shareholders³⁴⁴ of the corporation it is taxed again.³⁴⁵ *S. Corporations* provide the same liability protection of a *C. Corporation*; however, an *S. Corporation* is taxed just once – when the profits are distributed to the shareholders.³⁴⁶

In order to form a corporation in Maine, articles of incorporation must be filed with the Secretary of State of Maine.³⁴⁷ Generally, the articles of incorporation should contain: the corporate name, the amount of shares, the classification of shares,³⁴⁸ class rights of the shareholder class, the address of the incorporator, and any other information required for that individual type of corporation. Because this paper is focused on the business activities of commercial fishing vessels and aquaculture farms with a limited number of investors and shareholders, it is likely that a close corporation will be formed. A close corporation is a “corporation that, at any given time, has not more than 20 shareholders of all classes of shares, whether or not the shareholders are entitled to vote.”³⁴⁹

III.B.6. Limited Liability Company

A limited liability company (LLC) is a hybrid business structure that “offers the limited liability of a corporation with the same tax structure of a partnership similar to an S. Corp. but

³⁴⁴ Note: Shareholder means the person whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation. Me. Rev. Ann. tit. 13, § 102 (2011). Essentially shareholders are the investors in the corporation and have an ownership interest.

³⁴⁵ See *supra* note 318.

³⁴⁶ *Id.*

³⁴⁷ Me. Rev. Ann. tit. 13, § 203 (2011).

³⁴⁸ Note: Shares means the units into which the interests of the corporation are divided. Me. Rev. Ann. tit. 13-C, § 102 (2011).

³⁴⁹ Me. Rev. Ann. tit. 13-C, § 102 (2011).

does not require many of the same corporate formalities.”³⁵⁰ The shareholders of an LLC are known as members, and LLCs can either be managed by the members or the members can appoint a manager.³⁵¹ In order to form an LLC, one or more persons must draft a certificate of formation and file the certificate of formation with the office of the Secretary of State of the Maine.³⁵² Contained within the certificate of formation should be the name of the LLC, and any other elements that are required for that particular LLC. Similar to corporations, the members are only liable up to the amount they have invested in the corporation.³⁵³

III.C. Choosing an Appropriate Business Structure

It is likely that commercial fisherman and aquaculture operators would want to either form a Corporation (particularly an S. Corp.) or an LLC because of the taxation structure and the ability to limit their personal liability to their amount invested in the corporation. These two business organizations allow their investors some liability protection against injured visitors and passengers. A person could form a sole proprietorship or partnership; however, that person would be personally liable for any injuries visitors or passengers may receive. When forming a business organization, an attorney should be consulted to explain all the benefits of the various business structures, and what would be the best business structure for that individual(s). In addition to informing the individual(s) about the various benefits of different business structures, the attorney can also help draft and file all the necessary documents for the business structure selected. If there are two or more individuals engaging in a business venture together, then each

³⁵⁰ See *supra* note 318.

³⁵¹ *Id.*

³⁵² Me. Rev. Ann. tit. 31, § 1531 (2011).

³⁵³ Rusty Rumley, The National Agricultural Law Center, Business Organizations Reading Room: Limited Liability Company, *available at*: <http://www.nationalaglawcenter.org/assets/readingrooms/businessorgs-llc.pdf>.

individual would probably want to retain his/her own attorney to help protect his/her individual interests during the formation of the business venture.

III.D. Piercing the Corporate Veil

When a person forms a business entity to protect him/herself personally from any liability that may arise as a result of conducting business, it is important that the person maintains the formalities and structure normally associated with that type of business organization. *Piercing the corporate veil*³⁵⁴ is a doctrine adopted by courts which allows the courts, under certain circumstances, to disregard the corporate form and protections from personal liability and hold shareholders or members personally liable.³⁵⁵ Courts often pierce the corporate veil in cases of “fraud; inadequate capitalization; failure to adhere to corporate formalities; and abuse of the corporate entity that results in complete dominance by the shareholder or shareholders.”³⁵⁶ Because of the ability of courts to pierce the corporate veil, it is important for a person conducting business under one of the business organizations that limits his/her personal liability to maintain the formalities required or else the investors could be held personally liable by the court for the actions of the business.

³⁵⁴ Note: Piercing the corporate veil is the judicial act of imposing personal liability on otherwise immune corporate officers, directors, or shareholders for the corporation’s wrongful acts. Black’s Law Dictionary 1264 (9th ed. 2009).

³⁵⁵ Fredric J. Bendremer Delaware LLCs and Veil Piercing: Limited Liability has its Limitations 10 Fordham J. Corp. & Fin. L. 385 (2005).

³⁵⁶ *Id.* at 388.

Section IV: Tourism in Maine

IV.A. Economic Contribution of Tourism into Maine's Economy

As discussed in the introduction, an estimated 9.5 million overnight visitors and 13.8 million day visitors visited Maine during the summer months of 2011.³⁵⁷ The primary purpose for visiting Maine, cited by both overnight and day visitors, was for outdoor recreation.³⁵⁸ In 2006, visitors to Maine spent approximately \$1 billion on lodging, \$3 billion on food, and \$1 billion on recreational activities.³⁵⁹ Outdoor recreation is one of the reasons why tourists visit Maine every year; this could be an area into which Maine's fishermen and aquaculture operators could expand their businesses.

The University of Maine's Department of Resource Economics and Policy defines agri-tourism as "any commercial farm enterprise that brings consumers onto the farm to purchase agricultural products or to engage in farm-based activity for enjoyment."³⁶⁰ In 2006, the University conducted a survey of about 10% of the total farms in Maine, or 766 farms, to examine agri-tourism's impact on Maine's economy. The survey found that agri-tourism activities on these farms accounted for about \$28.3 million dollars of sales that directly benefited the farms conducting the agri-tourist activities, and another \$12.5 million in indirect economic benefits, for a total economic contribution in 2005 of about \$40.8 million dollars.³⁶¹ As the numbers show, agri-tourism is big business in Maine; and aquaculture farms and commercial fishing vessels could tap into this economic revenue.

³⁵⁷ See *supra* note 1.

³⁵⁸ See *supra* note 2.

³⁵⁹ See *supra* note 3.

³⁶⁰ Thomas G. Allen, Todd M. Gabe, James C. McConnon, The University of Maine, Department of Resource Economics and Policy, *The Economic Contribution of Agri-Tourism to the Maine Economy (2006)*, available at: <http://www.umaine.edu/soe/files/2009/06/repstaffpaper563.pdf> [hereinafter *Economic Contribution*].

³⁶¹ *Id.*

IV.B. Tapping into the Tourist Industry

There are numerous ways that commercial fishermen and aquaculture operators who wish to earn extra money, either by carrying passengers for hire on tours or opening up their aquaculture operations, can tap into the tourism industry. The Internet could be a great way of tapping into tourism by developing a *Facebook* page, or other social media pages, to show tourists what they may experience while onboard a vessel or while visiting an aquaculture farm. Another possibility for business expansion is teaming up with an organization, such as the Maine Lobster Council, that advertises commercial fishermen who are currently engaged in lobster boat tours. The Maine Lobster Council's website describes lobster boat tours as a way to get out on the water, experience Maine's coastline, and learn about lobster fishing and lobster conservation methods.³⁶² Another possible advertisement resource is for commercial fishermen and aquaculture operators to advertise their operations on Maine's Department of Tourism's website, [visitmaine.com](http://www.visitmaine.com).³⁶³

IV.B.1. Partnering with Hotels and Restaurants

In addition to advertising through various methods of social media and websites, commercial fishermen and aquaculture operators could develop a limited partnership relationship with bed and breakfasts, inns, hotels, and restaurants to help advertise and to share some of the profits that are earned as a result of this relationship. Examples are:

- having brochures featured in the lobbies of hotels and inns
- the ability for tourists to book their tours through a hotel

³⁶² Maine Lobster Council, Lobster Boat Tours, *available at*: <http://www.lobsterfrommaine.com/lobster-boat-tours-maine.aspx>.

³⁶³ Maine Department of Tourism *available at*: <http://www.visitmaine.com/>.

- having advertising on placemats or brochures located in entrances of restaurants that feature fresh, locally-caught seafood. The signage could indicate restaurant patrons have the opportunity to go out and experience how their dinner is caught first hand.

For those restaurants and hotels that are on the water, a package could be developed that allows tourists to experience how a commercial fishing vessel and aquaculture farm operates, and then be brought to the restaurant or hotel where the seafood harvested that day is prepared for them.

If commercial fishermen and aquaculture farms wish to partner with the tourism industry and develop business relationships like the ones described above, then each individual who wishes to enter into such a partnership should retain his/her own attorney and have his/her attorney draft a partnership agreement. Each individual should retain his/her own attorney so that the attorney can look out for the individual's interests and protect his/her interests within the formation of the partnership agreement. Partnership agreements describing the relationships above are important because these partnership agreements could describe who is liable if someone were to be hurt. In addition to protecting themselves from liability, how the profits are to be shared should also be included, as well as anything else which is determined to be important by the individuals and their attorneys.

IV.B.1.a. Alternative Dispute Resolution

Alternative dispute resolution is “a procedure for settling a dispute by means other than litigation such as arbitration or mediation.”³⁶⁴ Arbitration is “a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.”³⁶⁵ Mediation is “a method of nonbinding dispute resolution

³⁶⁴ *Black's, supra* note 207 at 91.

³⁶⁵ *Black's, supra* note 207 at 119.

involving a neutral third party who tries to help the disrupting parties reach a mutually agreeable solution.”³⁶⁶ The benefits of alternative dispute resolutions, such as mediation and arbitration, are that they are often less costly and time consuming than traditional litigation. When developing a partnership agreement like the ones discussed above, the parties to the agreement may want to discuss possibly including some form of alternative dispute resolution should something occur in the future.

IV.C. What People are Already Doing

There are already commercial fishermen taking tourists out on commercial fishing demonstrations, and aquaculture farms opening up their facilities to tourists both in Maine and throughout the world. One vessel in Camden, Maine conducts what it calls “eco-tours” and lobster fishing onboard its vessel.³⁶⁷ The tour is a two-hour cruise onboard the vessel, where tourists will see the captain haul traps and band the live lobsters caught as well as discuss lobster ecology and what it is like being a lobster fisherman.³⁶⁸ In Alaska tourists can go aboard a crab fishing vessel for a three and a half-hour tour where they can observe a crab fisherman setting and hauling crab pots and see what is being caught.³⁶⁹ On the Chesapeake Bay, tourists can take a tour of the bay onboard a Skipjack, and observe the fishermen haul crab pots and dredge for oysters.³⁷⁰ In addition to observing how commercial fishermen fished the Chesapeake Bay for generations, tourists are also educated on the ecology of the Bay and how these two species interact with other species in the bay.

³⁶⁶ *Black’s*, *supra* note 207 at 1070.

³⁶⁷ Eco-tour and Lobster Fishing on the Live Lady Too, *available at*: <http://livelyladytoo.com/>.

³⁶⁸ *Id.*

³⁶⁹ Bering Sea Crab Fisherman’s Tour, About the Tour, *available at*: <http://56degreesnorth.com/default.asp?pageid=2>.

³⁷⁰ Skipjack Tours, Environmental and Natural History Tours, *available at*: <http://www.skipjacktours.com/tours.html>.

Conclusion

In order for commercial fishermen to carry passengers for hire they need to comply with a lot of regulations as well as receive their captain licenses. Both commercial fishermen and aquaculture operators risk being liable for any serious injuries to tourists that may occur while the tourists are onboard their vessels or visiting their farms; however, there are various ways that commercial fishermen and aquaculture operators can protect themselves and limit their liability. Commercial fishermen and aquaculture operators can potentially limit their personal liability through a corporate structure, maintaining a safe and clean vessel and facilities, and having adequate liability insurance should an incident occur. The costs to carry passengers onboard a commercial fishing vessel or making an aquaculture farm safe for tourists could be expensive, however, the income from tourism could be even greater. Many tourists who visit Maine do so to experience the outdoors. Commercial fishermen and aquaculture farm operators could potentially tap into this tourism industry as some commercial fishermen and aquaculture operators have already begun to do – not just in Maine but in other parts of the country.

APPENDIX A: Glossary

Accessible: Complying with the applicable regulations for vessels and facilities. 49 C.F.R. § 39.3 (2012).

Actual Notice: Notice given directly to, or received personally by a party. Black's Law Dictionary 1164 (9th ed. 2009).

Admiralty Jurisdiction: The exercise of authority over maritime cases by the U.S. district courts sitting in admiralty. Black's Law Dictionary 53 (9th ed. 2009).

Agri-Tourism: Any commercial farm enterprise that brings consumers onto the farm to purchase agricultural products or to engage in farm-based activity for enjoyment. Thomas G. Allen, Todd M. Gabe, James C. McConnon, The University of Maine, Department of Resource Economics and Policy, The Economic Contribution of Agri-Tourism to the Maine Economy (2006), *available at*:
<http://www.umaine.edu/soe/files/2009/06/repstaffpaper563.pdf>.

Alternative Dispute Resolution: A procedure for settling a dispute by means other than litigation such as arbitration or meditation. Black's Law Dictionary 91 (9th ed. 2009).

Ambiguous: An uncertainty of meaning or intention, as in a contractual term or statutory provision. Black's Law Dictionary 93 (9th ed. 2009).

Appeals Court: A court with jurisdiction to review decisions of lower courts or administrative agencies. Black's Law Dictionary 405 (9th ed. 2009).

Arbitration: A method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding. Black's Law Dictionary 119 (9th ed. 2009).

Bio-security: The protection of fish or shellfish from infections including viral, bacterial, fungal, or parasitic agents. Abraham Joseph, Biosecurity for Aquaculture Facilities, *available at*:
http://www.europharma.cl/index2.php?option=com_docman&task=doc_view&gid=1&Itemid=24.

Circuit: The judicial division of the United States, Maine is located within the First Circuit and is one of the thirteen circuits into which the U.S. federal courts of appeals are organized. Black's Law Dictionary 276 (9th ed. 2009).

Civil Action in Admiralty: Any tort within admiralty jurisdiction. Black's Law Dictionary 53 (9th ed. 2009).

Civil Action: An action brought to enforce, redress, or protect a private or civil right; a noncriminal litigation also known as a lawsuit. Black's Law Dictionary 34 (9th ed. 2009).

Claim: A demand for money, property, or a legal remedy to which one asserts a right; especially, the part of the complaint in a civil action specifying what relief the plaintiff asks for. Black's Law Dictionary 282 (9th ed. 2009).

Close Corporation: A corporation that, at any given time, has not more than 20 shareholders of all classes of shares, whether or not the shareholders are entitled to vote. Me. Rev. Ann. tit. 13, § 102 (2011).

Coastwise: Vessels engaged in domestic trade, or those traveling regularly from port to port in the United States. U.S. Customs and Border Protection, What Every Member of the Trade Community Should Know About: The Passenger Vessel Services Act 7 (2010) *available at:* http://www.cbp.gov/linkhandler/cgov/trade/legal/informed_compliance_pubs/pvsa_icp.ctt/pvsa_icp.pdf.

Cognizant Officer in Charge, Marine Inspection (cognizant OCMI): The OCMI that has immediate jurisdiction over a vessel for the purpose of performing vessel inspections and ensuring compliance with the regulations. 46 C.F.R. § 175.400 (2012).

Commercial Service: a vessel engaged in any type of trade or business involving the transportation of goods or individuals, except service performed by a combatant vessel. 46 U.S.C.S. § 2101(5) (2012).

Common Law: The body of law derived from judicial decisions rather than from statutes or constitutions. Black's Law Dictionary 313 (9th ed. 2009).

Consideration: An economic benefit, inducement, right, or profit including payment accruing to an individual, person, or entity. 46 U.S.C.S. § 2101(5a) (2012).

Contributory Negligence: When a plaintiff's own negligence played a part in causing the plaintiff's injury and that is significant enough to bar the plaintiff from recovering damages. Black's Law Dictionary 1134 (9th ed. 2009).

Cruise to Nowhere: Where a vessel is transports passengers from a U.S. port to the high seas or foreign waters and then returns to the same port from which embarked. U.S. Customs and Border Protection, What Every Member of the Trade Community Should Know About: The Passenger Vessel Services Act 15 (2010) *available at:*
http://www.cbp.gov/linkhandler/cgov/trade/legal/informed_compliance_pubs/pvsa_icp.ctt/pvsa_icp.pdf.

Decedent: A dead person. Black's Law Dictionary 465 (9th ed. 2009).

Default: To be neglectful. Black's Law Dictionary 480 (9th ed. 2009).

District Court: A trial court having general jurisdiction within its judicial district. Black's Law Dictionary 407 (9th ed. 2009).

Duty of Care: A legal obligation that is owed or due to another that needs to be satisfied. Black's Law Dictionary pg. 580.

Emergency Position Indicating Radio Beacon (EPIRB): An EPIRB when activated will send a locating signal to search and rescue authorities indicating the location of the stricken sailors. Washington Department of Transport: Marine Information.
<http://www.transport.wa.gov.au/imarine/19164.asp>.

Facility: All or any portion of buildings, structures, sites complexes, equipment, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located. 49 C.F.R. § 39.1 (2012).

Fishing Vessel: A vessel that commercially engages in the catching, taking, or harvesting of fish or an activity that can reasonably be expected to result in the catching, taking, or harvesting of fish. 46 U.S.C.S. § 2101(11a) (2012).

Forum Selection Clause: A contractual provision in which the parties establish the place (such as the country, state, or type of court) for specified litigation between them. Black's Law Dictionary 726 (9th ed. 2009).

General Partnership: A partnership in which all partners participate fully in running the business and share equally in the profits and losses. Black's Law Dictionary 1230 (9th ed. 2009).

Gross Tonnage: Is an indicator of a vessel's approximate volume as determined in accordance with the regulations and recorded on the vessel's Tonnage Certificate. 46 C.F.R. § 175.400 (2012).

Heirs: A person who, under the laws of intestacy, is entitled to receive an intestate decedent's property. Black's Law Dictionary 791 (9th ed. 2012).

In Rem (Against a Thing): A court can place a judgment against the vessel itself. Black's Law Dictionary 864 (9th ed. 2009).

Intestate: Of or relating to a person who has died without a valid will. Black's Law Dictionary 898 (9th ed. 2012).

Invitee: A person who has the landowner's permission to be on the land for the landowner's benefit. The National Agricultural Law Center, Land Owner Liability: An Overview, *available at:* <http://www.nationalaglawcenter.org/assets/overviews/landownerliability.html>.

Legislative History: The background and events leading to the enactment of a statute, including hearings, committee reports, and floor debates. The legislative history is sometimes used by courts to interpret what was a legislature's intent when passing a statute that is ambiguous. Black's Law Dictionary 838 (9th ed. 2009).

Licensee: A person who is on a landowner's property with the owner's permission, however, this person does not provide any benefit to a landowner. The National Agricultural Law Center, Land Owner Liability: An Overview, *available at:* <http://www.nationalaglawcenter.org/assets/overviews/landownerliability.html>.

Limited Liability Partnership: A partnership in which a partner is not responsible for acts committed by another partner or employee which is not under that partner's supervision. Rusty Rumley, The National Agricultural Law Center, Business Organizations Reading Room: Limited Liability Partnerships *available at:* <http://www.nationalaglawcenter.org/assets/readingrooms/businessorgs-llp.pdf>.

Limited Partnership: A partnership composed of one or more general partners who control the business and are personally liable for the partnership's debts, and one or more limited partners who contribute capital and share profits but who cannot manage the business and are liable only for the amount of their investment. Black's Law Dictionary 1230 (9th ed. 2012).

Marine Employer: The owner, managing operator, charterer, agent master, or person in charge of a vessel, other than a recreational vessel. 46 C.F.R. § 16.105 (2012).

Master: The individual having command of a vessel also known as the vessel's captain, the master may be different than the owner of a vessel. 46 U.S.C.S. § 10101 (2012).

Mediation: A method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution. Black's Law Dictionary 1070 (9th ed. 2009).

Merchant Mariner Credential: Issued by the Coast Guard, the MMC is a combination of the individuals merchant mariner's document, license, and certificate of registry into a single credential, similar to a passport; which serves as the mariner's qualification document, identification, and certificate of service. 46 C.F.R. § 10.107 (2012).

Navigable Waters: When a body of water is used or is susceptible of being used in its ordinary condition as a highway for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water. *The Daniel Ball* 77 U.S. 557, 563 (1870).

Nearby Foreign Port: Any port in North America, Central America, the Bermuda Island, or West Indies with certain exceptions for some islands in the Caribbean. U.S. Customs and Border Protection, *What Every Member of the Trade Community Should Know About: The Passenger Vessel Services Act 13 (2010)* *available at:*
http://www.cbp.gov/linkhandler/cgov/trade/legal/informed_compliance_pubs/pvsa_icp.ctt/pvsa_icp.pdf.

Neglect: The omission of proper attention to a person or thing, whether inadvertent, negligent, or willful; the act or condition of disregarding. Neglect is also defined as the failure to give the proper attention, supervision, or necessities to such an extent that harm results or is likely to result. Black's Law Dictionary 1132 (9th ed. 2009).

Officer in Charge, Marine Inspection (OCMI): The Coast Guard officer who is in charge of a marine inspection zone for the performance of duties with respect to the inspection, enforcement, and administration of vessel safety and navigation laws and regulations. 46 C.F.R. § 175.400 (2012).

Original Jurisdiction: A court's power to hear and decide a matter before any other court can review the matter. Black's Law Dictionary 930 (9th ed. 2009).

Passenger For Hire: A passenger from whom consideration is contributed as a condition of carriage on the vessel. 46 U.S.C.S. § 2101(21a).

Passenger Vessel: A vessel of at least 100 gross tons carrying more than 12 passengers, including at least one passenger for hire or a ferry carrying a passenger. 46 U.S.C.S. § 2101(22) (2012).

Piercing the Corporate Veil: The judicial act of imposing personal liability on otherwise immune corporate officers, directors, or shareholders for the corporation's wrongful acts. Black's Law Dictionary 1264 (9th ed. 2009).

Placard: An official document, such as a license or permit or an advertisement posted in a public place. Black's Law Dictionary 1266 (9th ed. 2009).

Proximate Cause: 1. A cause that is legally sufficient to result in liability; an act or omission that is considered in law to result in a consequence, so that liability can be imposed on the actor. 2. A cause that directly produces an event and without which the event would not have occurred. Black's Law Dictionary 250 (9th ed. 2009).

Punitive damages: Damages awarded in addition to actual damages as a way of penalizing the wrongdoer or making an example to others when the defendant acted with recklessness, malice, or deceit. Black's Law Dictionary 448 (9th ed. 2009).

Qualified Individual with a Disability: An individual with a disability who is a passenger, with respect to obtaining transportation on or use of a passenger vessel. 49 C.F.R. § 39.3 (2012).

Reasonable Care: The degree of care that a prudent and competent person engaged in the same line of business or endeavor would exercise under similar circumstances. Black's Law Dictionary 240 (9th ed. 2009).

Serious Marine Incident: Any event involving a vessel in commercial service where: one or more people died; injury to crewmember or passenger requiring professional medical attention beyond first aid; damage to property in excess of \$100,000; or the actual or constructive loss of a vessel. 46 C.F.R. § 4.03-2 (2012).

Shareholder: The person whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation. Me. Rev. Ann. tit. 13, § 102 (2011).

Shares: The units into which the interests of the corporation are divided. Me. Rev. Ann. tit. 13-C, § 102.

Small Passenger Vessel: A vessel of less than 100 gross tons carrying more than 6 passengers, including at least one passenger for hire. 46 U.S.C.S. § 2101(35) (2012).

Sole Proprietorship: A business in which one person owns all the assets, owes all the liabilities, and operates in his or her personal capacity. Black's Law Dictionary 1520 (9th ed. 2009).

Statute of limitations: A law that bars claims after a specified period. Black's Dictionary Law 1546 (9th ed. 2009).

Territorial Waters: The waters that extend three nautical miles seaward of the baseline. U.S. Customs and Border Protection, What Every Member of the Trade Community Should Know About: The Passenger Vessel Services Act 11 (2010) *available at:*
http://www.cbp.gov/linkhandler/cgov/trade/legal/informed_compliance_pubs/pvsa_icp.ctt/pvsa_icp.pdf

Tort: A civil wrong, other than breach of contract, for which a remedy may be obtained in the form of damages; a breach of a duty that the law imposes on persons who stand in particular relation to one another such as the duty the captain of a vessel owes to his/her passengers. Black's Law Dictionary 1626 (9th ed. 2009).

Transportation Worker Identification Credential (TWIC): An identification credential issued by the Transportation Security Administration. 46 C.F.R. § 10.107 (2012).

Trespasser: A person who intentionally and without consent or privilege enters another's property. Black's Law Dictionary 1643 (9th ed. 2009).

Umbrella Insurance: Insurance that covers the losses that exceed the basic or usual limits of liability provided by other policies. Black's Law Dictionary 878 (9th ed. 2009).

Unforeseeable: Not foreseen; not expected. Black's Law Dictionary 1667 (9th ed. 2009).

Uninspected Passenger Vessel: An uninspected vessel of less than 100 gross tons carrying not more than six passengers, including at least one passenger for hire. 46 U.S.C.S. § 2101(42)(B) (2012).

Very High Degree of Care: The degree of care exercised in a given situation by someone in the business or profession dealing with the situation. Black's law dictionary 240 (9th ed. 2009).

Vessel: Every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water. 1 U.S.C.S. § 3 (2012).

Willful Misconduct: Misconduct committed voluntarily and intentionally. Black's Law Dictionary 1089 (9th ed. 2009).

APPENDIX B: Abbreviations

AAWPP: Assumed Average Weight per Person

Cognizant OCMI: Cognizant Officer in Charge, Marine Inspection

COI: Certificate of Inspection

DHS: Department of Homeland Security

DMR: Maine Department of Marine Resources

DOHSA: Death on the High Seas Act

DOT: Department of Transportation

EPIRB: Emergency Position Indicating Radio Beacon

FDA: Food and Drug Administration

FMV: Fair Market Value

LLA: Limitation of Liability Act

LLC: Limited Liability Company

MHDL: Marine Harvesting Demonstration License

MMC: Merchant Mariner Credential

MROP: Marine Radio Operator Permit

MTSA: Maritime Transportation Security Act

NDR: National Driver Register

OCMI: Officer in Charge, Marine Inspection

OUPV: Operators of Uninspected Passenger Vessel

P&I: Protection and Indemnity Insurance

PFD: Personal floatation device

PFH: Passenger(s) for hire

PVSA: Passenger Vessel Services Act of 1886

REC: Coast Guard Regional Exam Center

RFOL: Recreational Fishing Operators License

ROV: Report of Violation

SOLAS: International Convention for Safety of Life at Sea

TSA: Transportation Security Administration
TWIC: Transportation Worker Identification Credential
UPVs: Uninspected Passenger Vessels
USDA: Department of Agriculture

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- 46 C.F.R. § 16.230 (2012): Merchant Marine Officers and Seamen, random chemical testing requirement.
- 46 C.F.R. § 16.115 (2012): Merchant Marine Officers and Seamen, chemical testing penalties.
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APPENDIX D: Supplemental Materials

Passenger Vessels

U.S. Coast Guard Passenger Vessel Safety Program: The Coast Guard has developed the Passenger Vessel Safety Program (PVSP). The main objective of the program is to enable the response community and passenger vessel industry to have processes and procedures to prevent, respond, and mitigate a passenger vessel emergency. The PVSP website has a lot of information on passenger vessel safety and training as well as specific links applicable to both inspected and uninspected passenger vessels, which lists the regulations applicable to those vessels.

The Coast Guard PVSP is available at: <http://www.uscg.mil/pvs/default.asp>

U.S. Coast Guard Requirements for Uninspected Passenger Vessels Manual: This manual summarizes the regulations that apply to most uninspected passenger vessels as well as specifically lists the regulations that are applicable for each specific area of regulation such as vessel registration and general safety.

The Manual is available at:

<http://www.uscg.mil/pvs/docs/UPV%20JOBID%20REV5%20OCT07.pdf>

U.S. Coast Guard Small Passenger Vessel Pre-Inspection Check List: This is a checklist of areas that could possibly be inspected by the Coast Guard when a vessel is undergoing an inspection.

The Pre-Inspection Check List is available at:

<http://www.uscg.mil/d9/msuToledo/docs/SPVchecklist.pdf>

Coast Guard Form CG 3752: Form CG 3752 is the Coast Guard Application for Inspection of U.S. Vessel which needs to be filled out by a vessel owner and submitted to the nearest marine inspection zone located in Portland, Maine.

Form CG 3752 is available at: http://www.uscg.mil/forms/cg/cg_3752.pdf

Passenger Vessel Services Act: The U.S. Customs has published an information manual regarding the Passenger Vessel Services Act, which is intended to provide guidance and information to the trade community. The manual was first published in 2010 and has information regarding vessel restrictions and offers some guidance as to what U.S. Customs considers vessels engaging in coastwise trade.

The manual is available at:

http://www.cbp.gov/linkhandler/cgov/trade/legal/informed_compliance_pubs/pvsa_icp.ctt/pvsa_icp.pdf

Risk Assessment for Commercial Fishing Trips: The Alaska Marine Safety Education Association has published a risk assessment checklist that allows a commercial fishing vessel owner to evaluate the risks associated with that vessel to help identify the high-risk elements. This type of guide allows a commercial fisherman to identify the risks onboard their vessel.

The risk assessment is available at: http://www.amsea.org/pdf/FV_risk_assess.pdf

Marine Licensing

The National Maritime Center: The National Maritime Center (NMC) is the licensing authority within the Coast Guard. The goal of the NMC is to issue MMC to qualified mariners in an effective and efficient manner. The NMC website has a lot of useful information for a mariner wishing to obtain his or her MMC, including application forms and courses as well as the location of the nearest REC.

The NMC website is available at: <http://www.uscg.mil/nmc/default.asp>

Coast Guard Approved Courses: The Coast Guard allows mariners to receive training and instruction as well as take the MMC exams through schools that have courses that have been approved by the Coast Guard.

A complete list of Coast Guard approved courses located within Maine is available at:

http://www.uscg.mil/nmc/courses/approved_courses_state.asp?short=ME&long=Maine#list

Coast Guard Regional Exam Center, Boston: If a mariner elects to take the Coast Guard MMC exam directly with the Coast Guard and not take an approved course, the mariner would take the exam at their nearest Coast Guard Regional Exam Center (REC). The nearest REC for Maine mariners is located in Boston. In addition, complete applications for MMCs must be submitted to the REC.

REC Boston contact information:

USCG REC
455 Commercial Street
Boston, MA 02109
Phone: 1-(888) 427-5662
Fax: 1-(617) 223-3034

REC Boston website is available at: <http://www.uscg.mil/nmc/recs/bos.asp>

MMC Application Checklist: The Coast Guard provides a check list for those mariners who are applying for their MMC.

MMC application checklist is available at:

http://www.uscg.mil/nmc/announcements/Application_Process_Bulletin.pdf

Transportation Workers Identification Credential: Regulations require that each applicant for a MMC must have obtained or applied for a TWIC issued by the Transportation Security Administration. The TSA website lists all the information regarding receiving a TWIC as well as has several links that a mariner could use to apply for a TWIC.

TWIC information is available at:

http://www.tsa.gov/what_we_do/layers/twic/index.shtm

Marine Radio Operator Permit: A Marine Radio Operator Permit (MROP) is required to operate the radio onboard vessels which carry more than six passengers for hire. The Federal Communications Commission has published on their website information regarding when a MROP is required, and how to obtain an MROP.

MROP information available at:

<http://wireless.fcc.gov/commoperators/index.htm?job=mp>

Aquaculture

Woods Hole Sea Grant: In 2004, Woods Hole Sea Grant published *Some Liability Issues for Massachusetts Shellfish Farmers*, which is a bulletin that discusses the liability issues that aquaculture farmers could potentially face. The bulletin discusses liability of an aquaculture farm operator to their employees, members of the public as well as liability to those consuming their products.

The full bulletin is available at:

<http://www.whoi.edu/files/server.do?id=74464&pt=2&p=88636>

Business Agreements

Sample Business Agreements: There are several examples that persons could use as a model business agreement when entering into a business agreement or partnership together. These examples are only to be used as examples and when entering into any type of business agreement the parties should each retain their own attorney that could represent their personal interests and customize a business agreement for that specific purpose.

Sample partnership agreements available at:

<http://www.smallbusinessnotes.com/managing-your-business/sample-partnership-agreement.html>

http://lergp.cce.cornell.edu/Business_Management/Sample%20Partnership%20Agreement_110410.pdf

<http://www.sbdc.duq.edu/Files/Admin/Webnotes/1SamplePartnershipAgreement.pdf>

<http://www.gaylevanleer.com/PDF/Agreement.pdf>

Sample Limited Liability Partnership Agreements:

<http://contracts.onecle.com/micron/im-partnership-2007-02-27.shtml>

<http://www.venturecapitalprivateequitycontracting.com/pdf/Appendix1.pdf>

Sample Limited Partnership Agreements:

http://www.legaldocs.com/htsgif.d/xltd_p.htm

<http://contracts.onecle.com/blackstone/limited-partnership-2007.shtml>

http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=0CMYBEBYwBA&url=http%3A%2F%2Fwww.tannedfeet.com%2FForm_Limited_Partnership_Agreement.doc&ei=V-SzT5fVNsGR6gHd5aZCQ&usg=AFQjCNGtFmtKjLpsmJl-khDrtJq-JQrahg&sig2=fAZ4vRqXngqArbjigeerbQ

Tourism

Maine Office of Tourism: The Maine Office of Tourism website could be a tool used by commercial fisherman and aquaculture farmers to advertise their tour operations as well as tourism packages.

Main Office of Tourism website available at: <http://www.visitmaine.com/>

Valuing Lobster for Maine Coastal Tourism: Valuing Lobster for Maine Coastal Tourism is an article published by the University of Maine, Center for Tourism Research and Outreach and discusses how the lobster industry in Maine impacts Maine's tourist industry.

The article is available at:

<http://onlinelibrary.wiley.com/doi/10.1111/j.1745-4506.2008.00091.x/pdf>