

Proposed Action on Regulations

For information concerning citizen participation in the regulation-making process, see inside front cover.

Symbol Key

- Roman type indicates existing text of regulation.
- *Italic type* indicates proposed new text.
- [Single brackets] indicate text proposed for deletion.

Promulgation of Regulations

An agency wishing to adopt, amend, or repeal regulations must first publish in the Maryland Register a notice of proposed action, a statement of purpose, a comparison to federal standards, an estimate of economic impact, an economic impact on small businesses, a notice giving the public an opportunity to comment on the proposal, and the text of the proposed regulations. The opportunity for public comment must be held open for at least 30 days after the proposal is published in the Maryland Register.

Following publication of the proposal in the Maryland Register, 45 days must pass before the agency may take final action on the proposal. When final action is taken, the agency must publish a notice in the Maryland Register. Final action takes effect 10 days after the notice is published, unless the agency specifies a later date. An agency may make changes in the text of a proposal. If the changes are not substantive, these changes are included in the notice of final action and published in the Maryland Register. If the changes are substantive, the agency must repropose the regulations, showing the changes that were made to the originally proposed text.

Proposed action on regulations may be withdrawn by the proposing agency any time before final action is taken. When an agency proposes action on regulations, but does not take final action within 1 year, the proposal is automatically withdrawn by operation of law, and a notice of withdrawal is published in the Maryland Register.

Title 08 DEPARTMENT OF NATURAL RESOURCES

Subtitle 02 FISHERIES SERVICE

08.02.01 General

Authority: Natural Resources Article, §4-215, Annotated Code of Maryland

Notice of Proposed Action

[10-185-P-I]

The Secretary of Natural Resources proposes to amend Regulation .01 under **COMAR 08.02.01 General**.

Statement of Purpose

The purpose of this action is to incorporate by reference Amendment I to the 2004 Chesapeake Bay Oyster Management Plan (September 2010). This amendment includes three strategies and associated actions to align the current plan with future shellfish aquaculture practices.

Sanctuaries

As a result of the dramatically expanded sanctuary network, sanctuaries no longer consist primarily of natural oyster bars. Instead, the expanded sanctuary network includes additional non-oyster bottom that surrounds the larger areas of interconnected natural oyster bars. The intention of the expanded sanctuary areas is not to prohibit clamming; therefore, the proposed action modifies Strategy 4.2 and allows clamming from within the new sanctuary boundaries as described in Section II of Oyster Sanctuaries of the Chesapeake Bay and Its Tidal Tributaries (September 2010). The plan limits clamming to existing clamming areas, and maintains the existing 150 foot buffer from any natural oyster bar and leased area. The best available science concludes that this set back distance mitigates concerns about sedimentation impacts from clamming on oysters. This modification will allow commercial clamming to continue in traditional and currently legal areas within the proposed sanctuaries. The prohibition of all wild shellfish harvest, including clamming, will be maintained for previously established sanctuaries.

Current law prohibits the Department from issuing new aquaculture leases in designated sanctuaries. The Department is, however, supportive of this concept under certain conditions, and plans to pursue legislative change during the 2011 Session of the General Assembly. Aquaculture in sanctuaries under specified conditions can be compatible to restoration by adding to localized water quality improvements, providing ecosystem functions through oyster shell habitat creation, and enhancing natural recruitment of baby oysters within the sanctuary when reproductive oysters are used. If aquaculture leasing were allowed in sanctuaries, the Department is interested in establishing initial limits on the amount of allowed leased area (i.e., no more than 10% of entire sanctuary), prohibiting leases on and within 150 feet of natural oyster bars described in the survey of 1906 – 1912.

Enforcement

The proposed action modifies Strategy 4.6 to require appropriate enforcement measures pertaining to the allowance of certain aquaculture activities and clamming in designated oyster sanctuaries. Enforcement measures are necessary to protect wild oysters and their associated reef habitat, and private leased areas. The Department will monitor clamming in sanctuaries through implementation of a new reporting system. The actions to achieve this strategy include the utilization of the new Maryland Law Enforcement Information Network (MLEIN), a monitoring system using radar, day cameras, and infrared detectors, to provide 24 hours/7 days a week monitoring of any potential illegal activity in designated sanctuaries. Additionally, the Department will work with the Maryland District Court to prosecute natural resource violations, and to expand the 2010 "Natural Resource Day" pilot program in Anne Arundel County to other counties. This pilot program has proven to be effective and beneficial since its implementation.

Shellfish Sanitation Control

The proposed action creates Strategy 5.5 and sets forth action for Maryland compliance with the National Shellfish Sanitation Program (NSSP), a federal/state cooperative program recognized by the U.S. Food and Drug Administration and the Interstate Shellfish Sanitation Conference (ISSC) for the sanitary control of shellfish produced and sold for human consumption. The Department will seek to accomplish specific actions in the future including: tagging requirements for harvested oysters, dealer record-keeping

requirements, and the implementation of a harvest tracking system. Failure to comply with the NSSP requirements could result in a closure to Maryland's public and private oyster harvest.

Regional Oyster Industry Advisory Committees

While not specifically identified in a plan at this time, the Department is committed to enhancing and/or establishing the process to obtain advisory information pertaining to the management of Maryland's public oyster fishery from the oyster industry. Currently, the Department obtains input from the County Oyster Committees established by Natural Resources Article, §4-1106, Annotated Code of Maryland. The Oyster Advisory Commission recommended that the structure of the County Oyster Committees be evaluated. More recently, oyster industry representatives have requested the Department's consideration of the establishment of Regional Oyster Industry Advisory Committees. The purpose of these regional committees would be to provide recommendations pertaining to the regional management of Maryland's public oyster fishery consistent with the Department's management principles. Rather than having two separate advisory bodies, County Oyster Committees and Regional Oyster Industry Advisory Committees, the Department plans to have further discussions with the industry before proceeding, recognizing that this will require legislative action during the 2011 Session of the General Assembly.

Five-Year Review

The adoption of a fishery management plan, including the 2004 Chesapeake Bay Oyster Management Plan, establishes a framework for adaptive management over time. Fishery management plans are periodically reviewed to determine if the goals, objectives, strategies, and actions are still appropriate. The Department has committed to reviewing the effectiveness of the locations of sanctuaries, public shellfish fishery areas, and aquaculture areas every 5 years and to propose changes where needed.

Comparison to Federal Standards

There is no corresponding federal standard to this proposed action.

Estimate of Economic Impact

The proposed action has no economic impact.

Economic Impact on Small Businesses

The proposed action has minimal or no economic impact on small businesses.

Impact on Individuals with Disabilities

The proposed action has no impact on individuals with disabilities.

Opportunity for Public Comment

Comments may be sent to Oyster and Aquaculture Plan Comment, Regulatory Staff, Department of Natural Resources, Fisheries Service, B-2, 580 Taylor Avenue, Annapolis, MD 21401, or call 410-260-8260, or email to fisheriespubliccomment@dnr.state.md.us, or fax to 410-260-8310. Comments will be accepted through August 16, 2010.

Public hearings will be held concerning the adoption of this proposal on:

- July 7 at 6 p.m. at Anne Arundel Community College, Pascal Center for Performing Arts, 101 College Parkway, Arnold, MD 21012;
- July 13 at 6 p.m. at Leonardtown High School Auditorium, 23995 Point Lookout Road, Leonardtown, MD 20650;
- July 22 at 6 p.m. at Salisbury University, Caruthers Hall Auditorium, 1101 Camden Ave., Salisbury, MD 21801; and
- August 5 at 6 p.m. at the Chesapeake College, Rufus M. and Loraine Hall Todd Performing Arts Center, located at corner of Rte. 50 and Rte. 213, Wye Mills, MD 21679.

Sign language interpreters and other appropriate accommodations for individuals will be provided upon request.

Editor's Note on Incorporation by Reference

Pursuant to State Government Article, §7-207, Annotated Code of Maryland, Amendment I to the 2004 Chesapeake Bay Oyster Management Plan (September 2010) has been declared a document generally available to the public and appropriate for incorporation by reference. For this reason, it will not be printed in the Maryland Register or the Code of Maryland Regulations (COMAR). Copies of this document are filed in special public depositories located throughout the State. A list of these depositories was published in 37:1 Md. R. 9 (January 4, 2010), and is available online at www.dsd.state.md.us. The document may also be inspected at the office of the Division of State Documents, 16 Francis Street, Annapolis, Maryland 21401.

.01 Fishery Management Plans.

A. The following Chesapeake Bay Program Agreement Commitment Reports (Fishery Management Plans) are adopted and incorporated by reference:

- (1) — (2) (text unchanged)
- (3) Chesapeake Bay Oyster Management Plan (July 1989), Chesapeake Bay 1994 Oyster Fishery Management Plan (December 1994), [and] 2004 Chesapeake Bay Oyster Management Plan (December 2005), and Amendment I to the 2004 Chesapeake Bay Oyster Management Plan (September 2010);
- (4) — (15) (text unchanged)

B. — C. (text unchanged)

JOHN R. GRIFFIN
Secretary of Natural Resources

Subtitle 02 FISHERIES SERVICE

Notice of Proposed Action

[10-181-P]

The Secretary of Natural Resources proposes to amend:

- (1) Regulation .12 under **COMAR 08.02.02 Soft-Shell Clams**; and
- (2) Regulations .02 and .03 under **COMAR 08.02.07 Hard-Shell Clams**.

Statement of Purpose

The purpose of this action is to correct language pertaining to the harvest of clams. Restrictions applying to shellfish harvest are corrected in order to align these regulations with the requirements proposed for adoption under Ch. 173, Acts of 2009.

As a result of the dramatically expanded sanctuary network, sanctuaries no longer primarily consist of natural oyster bars. Instead, the expanded sanctuary network includes additional non-oyster bottom that surrounds the larger areas of interconnected natural oyster bars. Currently, all shellfish (oysters and clams) harvest is prohibited in existing sanctuaries. The prohibition of all wild shellfish harvest, including clamming, will be maintained for existing sanctuaries. However, the Department proposes to modify the management of commercial clamming in new sanctuaries. This modification will allow commercial clamming to continue in traditional and currently legal areas within the proposed sanctuaries. If this action is not taken, there will be an unintended economic impact to the commercial clamming industry. The Department will monitor clamming in sanctuaries through an additional reporting system.

Specifically, the proposed action clarifies that clam harvest is prohibited within 150 feet of a public shellfish fishery area, a natural oyster bar (including bars in sanctuaries), sanctuaries established in

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Section I of the Oyster Sanctuaries of the Chesapeake Bay and Its Tidal Tributaries (September 2010), or leased areas. This prohibition protects physical damage to oyster reefs as well as damage to young oysters from sedimentation.

Comparison to Federal Standards

There is no corresponding federal standard to this proposed action.

Estimate of Economic Impact

I. Summary of Economic Impact. The proposal has an economic impact on the issuing agency.

| II. Types of Economic Impact. | Revenue (R+/R-) | Magnitude |
|-------------------------------|---------------------|----------------|
| | Expenditure (E+/E-) | |
| A. On issuing agency: | (E+) | Indeterminable |
| B. On other State agencies: | NONE | |
| C. On local governments: | NONE | |

| | Benefit (+) | Magnitude |
|---|-------------|-----------|
| | Cost (-) | |
| D. On regulated industries or trade groups: | NONE | |
| E. On other industries or trade groups: | NONE | |
| F. Direct and indirect effects on public: | NONE | |

III. Assumptions. (Identified by Impact Letter and Number from Section II.)

A. The increase in expenses associated with these regulations corresponds to increased enforcement costs associated with the new regulations. Since a prior number of regulation infractions is unknown, it is impossible to know the increase in expenses associated with these regulations. However, assuming that the infractions are minimal, the increase in enforcement expenditures should also be minimal.

Economic Impact on Small Businesses

The proposed action has minimal or no economic impact on small businesses.

Impact on Individuals with Disabilities

The proposed action has no impact on individuals with disabilities.

Opportunity for Public Comment

Comments may be sent to Oyster and Aquaculture Plan Comment, Regulatory Staff, Department of Natural Resources, Fisheries Service, B-2, 580 Taylor Avenue, Annapolis, MD 21401, or call 410-260-8260, or email to fisheriespubliccomment@dnr.state.md.us, or fax to 410-260-8310. Comments will be accepted through August 16, 2010.

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- July 13 at 6 p.m. at Leonardtown High School Auditorium, 23995 Point Lookout Road, Leonardtown, MD 20650;

- July 22 at 6 p.m. at Salisbury University, Caruthers Hall Auditorium, 1101 Camden Ave., Salisbury, MD 21801; and
- August 5 at 6 p.m. at the Chesapeake College, Rufus M. and Loraine Hall Todd Performing Arts Center, located at corner of Rte. 50 and Rte. 213, Wye Mills, MD 21679.

Sign language interpreters and other appropriate accommodations for individuals will be provided upon request.

08.02.02 Soft-Shell Clams

Authority: Natural Resources Article, §§4-215, 4-1033, and 4-1039, Annotated Code of Maryland

.12 Restricted Areas.

A. From May 1 through September 30, [a person] *an individual* may not catch or attempt to catch soft-shell clams by hydraulic dredge within 300 feet of a private bathing beach which extends not more than 300 feet along the shore and is marked with a sign which shall:

[A.] (1) — [F.] (6) (text unchanged)

B. *An individual may not harvest soft-shell clams within 150 feet of a:*

(1) *Natural oyster bar;*

(2) *Leased area;*

(3) *Public shellfish fishery area established in COMAR 08.02.04.17A; or*

(4) *Sanctuary designated in Section I of "Oyster Sanctuaries of the Chesapeake Bay and Its Tidal Tributaries (September 2010)" that is incorporated by reference in COMAR 08.02.04.15A.*

08.02.07 Hard-Shell Clams

Authority: Natural Resources Article, §4-215, Annotated Code of Maryland

.02 Use of Hard-Shell Clam Dredges in Tangier Sound and Pocomoke Sound.

A. (text unchanged)

B. *Areas Where Hard-Shell Clams May Be Taken by Dredge.* Subject to the provisions of [§C of this regulation] *Regulation .03C of this chapter*, a licensed person may catch hard-shell clams with a dredge in the following waters:

(1) — (2) (text unchanged)

[C.] (proposed for repeal)

[D.] C. (text unchanged)

.03 General.

A. — B. (text unchanged)

C. *An individual may not harvest hard-shell clams within 150 feet of a:*

(1) *Natural oyster bar;*

(2) *Leased area;*

(3) *Public shellfish fishery area established in COMAR 08.02.04.17A; or*

(4) *Sanctuary designated in Section I of Oyster Sanctuaries of the Chesapeake Bay and Its Tidal Tributaries (September 2010) that is incorporated by reference in COMAR 08.02.04.15A.*

JOHN R. GRIFFIN
Secretary of Natural Resources

Subtitle 02 FISHERIES SERVICE

08.02.04 Oysters

Authority: Natural Resources Article, §§4-215, 4-1004, 4-1009, 4-1009.1, 4-1013, 4-1015, 4-1015.1, 4-1103, 4-1106, and 4-2A-03, Annotated Code of Maryland

Notice of Proposed Action

[10-179-P-I]

The Secretary of Natural Resources proposes to amend Regulations .06, .10, and .11, repeal existing Regulation .15, and adopt new Regulation .15 under **COMAR 08.02.04 Oysters**.

Statement of Purpose

The purpose of this action is to remove all former oyster sanctuaries and incorporate by reference Oyster Sanctuaries of the Chesapeake Bay and Its Tidal Tributaries (September 2010). This document contains coordinates for existing and proposed oyster sanctuaries in waters of the Chesapeake Bay and its tidal tributaries.

Sanctuary Expansion Process

Sanctuaries are areas where the wild harvest of oysters, and both oysters and clams in previously established sanctuaries, is prohibited. Aquaculture leases existing at the time of the enactment of Ch. 173, Acts of 2009, will be excluded from the sanctuary until terminated or surrendered. These existing leases are not located on natural oyster bars. The existing network of sanctuaries is made up of small dispersed areas. The Department's sanctuary network proposal will shift the sanctuary program from protecting only 9% of the remaining oyster bar habitat to one that protects 25% (9,000 acres). The remaining 75% (27,000 acres) of productive oyster bar habitat will remain open to the public oyster fishery. The expanded sanctuary network will also include half of the best remaining oyster bars. These "best bars" were identified through a scientific analysis of 282 oyster bars from Maryland's annual fall oyster survey. Best bars are oyster bars that over the last 10 years have consistently been among the top 10% of the oyster bars surveyed in Maryland. The other half of these best bars will remain in the public oyster fishery and be designated as public shellfish fishery areas.

The expansion of the network of sanctuaries was developed as a result of 6 years of extensive scientific evaluation and public participation. Both the Federal/State Programmatic Environmental Impact Statement (2004—09) on Oyster Restoration Alternatives for Chesapeake Bay and Maryland's Oyster Advisory Commission (2008—09) recommended an expanded sanctuary program, increased aquaculture, and a more targeted and scientifically based managed public oyster fishery.

Benefits

The sanctuary network is designed to:

- Protect half of the Bay's most productive oyster grounds that remain — allow investigation of the reasons why these areas remain most productive despite disease, sedimentation, degrading water quality, and, in some cases, harvest pressure;
- Facilitate development of natural disease resistance — the long-term strategy for restoring oysters;
- Provide essential natural ecological functions that can not be obtained on a harvest bar;
- Serve as a reservoir of reproductive capacity, generating larvae to populate other areas, including public shellfish fishery areas;
- Provide a broad geographic distribution across all salinity zones; and
- Increase our ability to protect these important areas from poaching.

Protecting at least 25% of quality oyster habitat is essential to both the future health and prosperity of the Bay's oyster population and to sustainable harvest. This plan is needed because:

- The current management approach is not sustainable and is not yielding the results for our ecosystem or our watermen; and
- More than \$40 million of State and federal funds have been invested since 1994 and 75% of these funds have been directed towards the commercial oyster fishery. The results of our past actions include:
- The Chesapeake Bay's oyster population stands at 1% of historic levels;
- Over the past 25 years Maryland has lost 80% of its oyster bars, 90% of its oyster harvest, 75% of its oyster harvesters, and 80% of its oyster processing companies; and
- The ecological function of oysters has been lost and 1,500+ watermen can no longer make a living from the Bay's oyster population.

The proposed action increases the amount paid by the Department for oyster shell from 25 cents to 50 cents based on laws enacted under Ch. 319, Acts of 2009.

It is anticipated that both recreational and commercial fishing will benefit from improved oyster bar habitat in sanctuaries because oyster bar habitat provides critical habitat to blue crabs, striped bass, white perch, and other important finfish species. Oysters within sanctuaries are also expected to increase the abundance of adult oysters whose larvae are expected to settle not only within the sanctuary, but also on public shellfish fishery areas in the vicinity of the sanctuaries.

Aquaculture in Sanctuaries

Current law prohibits the Department from issuing new aquaculture leases in sanctuaries. The Department is, however, supportive of this concept under certain conditions and plans to pursue legislative authority during the 2011 Session of the General Assembly. Aquaculture leasing in sanctuaries under specified conditions can be compatible to restoration by adding to localized water quality improvements, providing ecosystem functions through habitat creation, and if reproductive oysters are used for aquaculture could enhance natural recruitment within the sanctuary. If aquaculture leasing were allowed in sanctuaries, the Department is interested in establishing initial limits on the amount of allowed leased area (i.e., 10% of entire sanctuary), prohibiting leases to occur on natural oyster bars as described by the charts of the oyster survey of 1906 to 1912, prohibiting leasing from within 150 feet of a natural oyster bar and implementing stringent penalties to lease holder for poaching on a natural oyster bar within a sanctuary. The best available science concludes that this set back distance mitigates concerns about sedimentation impacts from clamming on oysters.

Modifications from Original Proposal

The proposed action is a result of modifications made to the draft proposed sanctuary areas released for public review on December 3, 2009, based upon an extensive public participation process that included four 8-hour open houses located across the State where the public could attend and learn about the draft proposal, get their questions answered, and provide comments. The Department also obtained public input through meetings of its Oyster Advisory Commission, Sport and Tidal Fisheries Advisory Commissions, and Department of Agriculture's Aquaculture Coordinating Council, and several meetings with representatives of the State's fishing industry organizations (Maryland Watermen's Association, Chesapeake Bay Commercial Fishermen's Association, and Maryland Oystermen's Association), County Oyster Committees, Sport Fishing Organizations, State Aquaculture Agencies, Scientific Community, and Environmental Advocacy Organizations. Furthermore, there were extensive public deliberations on this issue with legislators and the

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public during the 2010 Session of the General Assembly. Modifications include:

- Modifications to the draft proposed sanctuaries in each of the counties where sanctuaries were proposed to mitigate industry concerns while still achieving the Department's sanctuary objectives.
- Protecting half of the best bars for sanctuaries and the other half for the public shellfish fishery (best bars were identified by a scientific analysis of oyster data — these represent the most robust oyster bars in the State).
- The Department added several new sanctuary areas to accommodate the Marylanders Grow Oysters Program.

The Department recognizes that the proposed sanctuary network may have a short-term negative economic impact of 10—15% of the commercial oyster industry's harvest or a gross economic impact of \$350,000 — \$500,000 based upon the dockside value of the 2009—10 harvest reports. To mitigate this economic impact, the State intends to implement programs to support a sustainable public oyster fishery. This is in addition to the \$4 million of State and federal funding available to pay watermen for restoration work and to help them invest in aquaculture business. Since December 2008, the Department has contracted 500—800 watermen each year to perform restoration projects for a total payout of \$2 to \$2.5 million annually. The federal portion of this funding is part of the \$15 million that Senator Barbara Mikulski and Maryland's Congressional Delegation was able to obtain in response to a federal fishery disaster declaration for the blue crab fishery.

Sanctuary changes by county that have been made from the draft proposed sanctuary areas released for public review on December 3, 2009 and this regulatory submission are summarized below.

Baltimore

- Reduced draft proposal to establish the entire Man O War Shoal as a sanctuary to splitting the area with the eastern side being proposed as a sanctuary and the larger, western side remaining open to the public oyster fishery.

Anne Arundel

- Added Chesapeake Bay mainstem sanctuary from Cedarhurst to Chesapeake Beach as compensation for modifications made in other counties.

Calvert

- Added a small sanctuary in the creeks north of Solomons Island to support the Marylanders Grow Oysters Program.
- Added a sanctuary on the mainstem north of Cove Point and near Chesapeake Beach as compensation for modifications made in other counties.

St. Mary's

- Removed north side of proposed Point Lookout sanctuary for a reduction of the proposed sanctuary area by 75%.
- Added Breton Bay as a sanctuary as compensation for the reduction of Point Lookout.
- Added small sanctuary in Wicomico River to support Marylanders Grow Oysters Program.

Kent

- Removed proposed sanctuary in middle of Chester River.
- Added sanctuary near mouth of Chester River as compensation for above modification.
- Department commitment to add power dredge study area.

Queen Anne's

- Removed proposed sanctuary in middle of Chester River.
- Added sanctuary at mouth of Chester River as compensation for above modification.
- Added sanctuary at Cox Creek to provide increased equity of impact across counties.

- Added sanctuary from Chesapeake Bay Environmental Center to Piney Neck to provide increased equity of impact across counties.
- Added Wye River sanctuary to provide increased equity of impact across counties.

Talbot

- Removed lower part of Tred Avon River sanctuary.
- Added sanctuary, but reduced size, in Miles River to provide increased equity of impact across counties.
- Added sanctuaries on north and south side of western shore of Tilghman Island as compensation for modifications to Tred Avon River, Miles River and Harris Creek sanctuaries.
- Added Wye River sanctuary to provide increased equity of impact across counties.
- Removed 65% of the power dredge area included in the proposed Harris Creek sanctuary.
- Department commitment to add power dredge study area.

Dorchester

- Reduced proposed sanctuary for the entire Little Choptank River by removing the proposed sanctuary area at mouth of Little Choptank River.
- Added sanctuaries to the Choptank River on the Dorchester County side (Rt. 50 to Castle Haven) as compensation for modification to the Little Choptank River sanctuary.
- Expanded Cooks Point sanctuary as compensation for modification to the Little Choptank River sanctuary.
- Department commitment to add power dredge study area.

Somerset

- Reduced the size of sanctuary west of Smith Island by removing a large portion of the southeast section.
- Added sanctuary in Nanticoke River as compensation for the above modification.
- Added sanctuary in Manokin River as compensation for the above modification.
- Added small sanctuary in Big Annemessex River to support the Marylanders Grow Oysters Program.

Wicomico

- Added Nanticoke River sanctuary as compensation for the modification to the sanctuary west of Smith Island in Somerset County.

Comparison to Federal Standards

There is no corresponding federal standard to this proposed action.

Estimate of Economic Impact

I. Summary of Economic Impact.

The proposed action has economic impacts on the Agency and regulated industry.

Revenue (R+/R-)

II. Types of Economic Impact.

Expenditure (E+/E-) Magnitude

A. On issuing agency:

| | | |
|-----------------|------|----------------|
| (1) Licensing | (R-) | Indeterminable |
| (2) Enforcement | (E+) | Indeterminable |

B. On other State agencies: NONE

C. On local governments: NONE

| | Benefit (+) Cost (-) | Magnitude |
|---|-------------------------|----------------|
| D. On regulated industries or trade groups: | | |
| (1) Oyster harvesters | (-) | Indeterminable |
| (2) Oyster aquaculture enterprises | (-) | Indeterminable |
| E. On other industries or trade groups: | | |
| (1) Commercial crabbers (blue crab) | (+) | Indeterminable |
| (2) Commercial and recreational finfish fishermen | (+) | Indeterminable |
| (3) Oyster shucking houses | (-) | Indeterminable |
| (4) Seafood restaurants | (-) | Indeterminable |
| F. Direct and indirect effects on public: | | |
| Public benefits | (+) | Indeterminable |

III. Assumptions. (Identified by Impact Letter and Number from Section II.)

A(1). The closure of segments of the bay to wild harvest may lead some oystermen to allow their Oyster Harvester license (OYH — \$50), Oyster Dredge Boat license (ODB-\$250), or Unlimited Tidal Fish License (TFL — \$300) to lapse. However, the number of individuals that may take this drastic measure is expected to be very small. A more realistic response is for these individuals to keep their licenses and discontinue paying the oyster harvester surcharge of \$300. Regardless of the exact response, the overall impact on revenue is expected to be minimal.

A(2). Sanctuary expansion can be expected to increase the cost of enforcement of sanctuary boundaries and regulations by MD Natural Resource Police. The magnitude of these increased expenditures will correspond to the level of sanctuary regulation violations (i.e., poaching and other sanctuary infractions) and the overall increase in the amount of the bay protected as sanctuaries. Direct costs of oyster bar restoration and rehabilitation will also be incurred, including an increase in the amount paid for oyster shell from 25 cents to 50 cents. The larger, more contiguous nature of the proposed sanctuaries will actually make identification and enforcement of sanctuary infractions easier, and offset some costs of monitoring more sanctuaries. Though not part of the proposed regulations associated with the sanctuary expansion the implementation of the MLEIN monitoring system, with its combination of radar, remote video sensors, and access to mapping and criminal databases, will also ease the cost of enforcement. The increase in penalties associated with infractions and enhanced judiciary support associated with this proposal is expected to further deter regulation violations, and minimize the additional cost of enforcement.

D(1). Based on last season's harvest reports (2009—2010), it is estimated the new sanctuaries will reduce the public oyster fishery by 10 to 15% in the short term, an economic impact of approximately \$350,000 to \$500,000 on gross revenue. There is also expected to be increased costs of harvesting (through increased travel costs to and from fishing areas as well as increased competition on the remaining bars open to public oyster harvesters, the opportunity cost of time as harvesters familiarizing themselves with new regulations and oyster bars, etc.) and a decrease in the biomass of oysters available for public harvest. The magnitude of this impact will directly correspond to the size and geographic distribution of the oyster population which will continue to be available to public oyster harvesters. This impact is expected to be minor as the industry is already traveling increased distances to harvest oysters. In the long run, however, the sanctuaries

will provide genetic diversity and serve as refuges against the threats associated with disease (particularly MSX and Dermo). The sanctuaries will also serve as sources of juvenile oysters which can enhance spat settlement in Public Shellfish Fishery Areas. Ultimately these sanctuaries will lead to a healthier oyster fishery. However, these benefits will likely accrue many years in the future.

D(2). Existing leases in the expanded sanctuaries will not be affected by the new regulations. There is, therefore, no additional cost to existing lease holders. However, the expansion of existing leases into the new sanctuaries will not be feasible. This should be a temporary impact, as the DNR supports leasing in sanctuaries under specified conditions, and will seek a legislative change to permit this activity in 2011. In the short-run, however, this could lead to higher costs than would otherwise be incurred if current leaseholders decide to expand operations. These additional costs could include increased travel time between lease holdings, and other costs associated with holding disjoint leases for the purpose of oyster aquaculture. Conversely, the existence of leases inside new sanctuary boundaries could lead to benefits from increased surveillance, particularly in the form of decreased incidents of poaching.

E(1). Oyster bars provide essential habitat to crabs. The sanctuaries are thus expected to help bolster the crab population to the benefit of commercial crabbers. These benefits will likely be delayed due to the time necessary to rehabilitate and restore sanctuary oyster bars. A study on the Patuxent River showed that habitat improvement could lead to higher catches in the blue crab trotline fishery with the same level of fishing effort. Commercial crab harvester's income could increase by a total of \$350,000 a year in that tributary alone. The magnitude of this impact Bay-wide is indeterminable.

E(2). The benefits to finfish fisheries stem from the additional optimal habitat that sanctuaries will provide to both juvenile and mature individuals. A survey of Chesapeake Bay recreational fishermen showed that they preferred to fish around oyster reefs and had significantly higher catches around reefs. The study estimated that recreational fishermen benefited about \$340 per restored acre per year due to increased catches. A successful oyster restoration program will be of significant benefit to sports fishermen and the charter boat industry. For example, it has been estimated that simply increasing the average catch rate per trip by striped fisherman by .5 fish per trip would increase the benefit from recreational fishing by \$5 million per year. These benefits will likely be delayed due to the time necessary to rehabilitate and restore sanctuary oyster bars.

E(3). Based on harvest data collected in 2009—2010, there will be an estimated decline in harvest of approximately 10-15%. The overall impact on oyster shucking houses will depend on the ability of cultured and imported oysters to attenuate this decline in harvest. If the combination of cultured and imported oysters result in a net increase in oysters supplied to shucking houses, the overall effect on oyster shucking houses could actually be positive even though the expansion of the sanctuaries taken alone would provide a negative impact. The remaining oyster shucking houses in Maryland obtain most of their shellstock from the Gulf of Mexico. The effects of the oil spill from an offshore drilling rig in the Gulf of Mexico on April 20, 2010, are likely to be the dominant impact on the future of these businesses rather than the small change in landings due to these regulations. While it is true that the processing industry has declined over the past 25 years with a 70% decrease in the number of oyster processing companies, there is no indication that this decline will continue and that the industry is not now in equilibrium. Any additional costs in terms of decreased supply of shellstock to shucking houses is relative to the status quo.

E(4). Because of the relatively small dip in supply of oysters associated with the sanctuary expansion compared to the overall

supply of oysters to Maryland from not only Chesapeake Bay, but from other parts of the country and the world, the impact on seafood restaurants in general is expected to be minimal. Though not directly a result of the regulations governing sanctuary expansion, the impact on seafood restaurants could be offset by an expanded aquaculture industry, improvements in other commercial fisheries and more science based management of the public oyster fishery, such that the net impact could be positive.

F. Public benefits stem from numerous sources including:

(1) Reductions in water turbidity (particularly reductions in pollution and algal blooms), leading to increased potential for recreational activities (boating, swimming, scuba, etc.) within Chesapeake Bay.

(2) Increased availability of recreational sports fish, blue crabs, and oysters.

(3) Increased value of private shoreline property due to expected decreases in pollution and algal blooms.

Economic Impact on Small Businesses

The proposed action has minimal or no economic impact on small businesses.

Impact on Individuals with Disabilities

The proposed action has no impact on individuals with disabilities.

Opportunity for Public Comment

Comments may be sent to Oyster and Aquaculture Plan — Comment, Regulatory Staff, Maryland Department of Natural Resources Fisheries Service, 580 Taylor Ave., B-2, Annapolis, MD 21401, or call 410-260-8260, or email to fisheriespubliccomment@dnr.state.md.us, or fax to 401-260-8310. Comments will be accepted through August 16, 2010. A public hearing will be held, TBD

Public hearings will be held concerning the adoption of this proposal on:

- July 7 at 6 p.m. at Anne Arundel Community College, Pascal Center for Performing Arts, 101 College Parkway, Arnold, MD 21012;
- July 13 at 6 p.m. at Leonardtown High School Auditorium, 23995 Point Lookout Road, Leonardtown, MD 20650;
- July 22 at 6 p.m. at Salisbury University, Caruthers Hall Auditorium, 1101 Camden Ave., Salisbury, MD 21801; and
- August 5 at 6 p.m. at the Chesapeake College, Rufus M. and Loraine Hall Todd Performing Arts Center, located at corner of Rte. 50 and Rte. 213, Wye Mills, MD 21679.

Sign language interpreters and other appropriate accommodations for individuals will be provided upon request.

Editor's Note on Incorporation by Reference

Pursuant to State Government Article, §7-207, Annotated Code of Maryland, the Oyster Sanctuaries of the Chesapeake Bay and Its Tidal Tributaries (September 2010) has been declared a document generally available to the public and appropriate for incorporation by reference. For this reason, it will not be printed in the Maryland Register or the Code of Maryland Regulations (COMAR). Copies of this document are filed in special public depositories located throughout the State. A list of these depositories was published in 37:1 Md. R. 9 (January 4, 2010), and is available online at www.dsd.state.md.us. The document may also be inspected at the office of the Division of State Documents, 16 Francis Street, Annapolis, Maryland 21401.

the daily catch limits for the taking of oysters from the [natural oyster bars] waters of the State are the following:

A. — C. (text unchanged)

.10 Dredging with an Auxiliary Yawl Boat.

A. A dredge boat may be propelled by means of an auxiliary yawl boat carried on the dredge boat to catch oysters in areas where dredge boats are permitted, except in [the waters]:

(1) [Above] *The waters above* a line in the Choptank River extending from Horn Point to Martin Point; [or]

(2) [Bordering] *The waters bordering* Kent Island south of the William Preston Lane Memorial Bridge and north of a line running due east from Bloody Point Lighthouse[.]; or

(3) *Areas established as oyster sanctuaries in Regulation .15A of this chapter.*

B. — C. (text unchanged)

.11 General Provisions.

A.— C. (text unchanged)

[D.] (proposed for repeal)

[E.] D. (text unchanged)

[F.] (proposed for repeal)

[G.] E. (text unchanged)

[H.] F. Fees for Purchasing, Hauling, and Planting Fresh Oyster Shell.

(1) (text unchanged)

(2) The rate to be paid to purchase fresh oyster shell shall be [25] 50 cents per bushel.

[I.] G. (text unchanged)

.15 Oyster Sanctuaries.

A. *Oyster Sanctuaries of the Chesapeake Bay and Its Tidal Tributaries (September 2010) designates oyster sanctuaries in the Chesapeake Bay and its tidal tributaries and is hereby incorporated by reference.*

B. *A person may not harvest:*

(1) *Wild oysters from a sanctuary established in §A of this regulation; or*

(2) *Clams from a sanctuary designated in Section I of Oyster Sanctuaries of the Chesapeake Bay and Its Tidal Tributaries (September 2010) that is incorporated by reference in §A of this regulation.*

C. *Aquaculture in Sanctuaries.*

(1) *Except as provided in §C(2) of this regulation, a shellfish lease may not be located in a sanctuary or within 150 feet of an oyster sanctuary established in §A of this regulation.*

(2) *Until termination in accordance with Natural Resources Article, §4-11A-09(f), Annotated Code of Maryland or surrender in accordance with COMAR 08.02.23.03K, leased areas and all areas within 150 feet of the leased areas existing at the time of the enactment of Ch.173, Acts of 2009 shall not be considered part of the sanctuaries as established in §A of this regulation.*

(3) *A leaseholder under Natural Resources Article, §4-11A, Annotated Code of Maryland or permit registrant under COMAR 08.02.23.04 shall notify the Department as specified on the Shellfish Aquaculture Harvester Permit 48 hours in advance of using a power dredge in areas described in §C(2) of this regulation.*

JOHN R. GRIFFIN
Secretary of Natural Resources

.06 Daily Catch Limit.

Except as provided in Regulation [.13] .14 of this chapter or in areas for which a permit has been issued under COMAR 08.02.23.04,

Subtitle 02 FISHERIES SERVICE

08.02.04 Oysters

Authority: Natural Resources Article, §§4-215 and 4-11A-04, Annotated Code of Maryland

Notice of Proposed Action
[10-180-P-I]

The Secretary of Natural Resources proposes to adopt new Regulation .17 under **COMAR 08.02.04 Oysters**.

Statement of Purpose

The purpose of this action is to incorporate by reference Public Shellfish Fishery Areas of the Chesapeake Bay and Its Tidal Tributaries (September 2010). This document contains coordinates for all public shellfish fishery areas (PSFA) in the Chesapeake Bay and its tidal tributaries. A PSFA is an area in State waters determined to be economically viable to the commercial oyster fishery and as a result is reserved for commercial harvest of wild oysters. The proposed PSFAs will maintain 168,000 acres of natural oyster bars and 75% (27,000 acres) of the remaining productive oyster habitat for the public oyster fishery. Leasing for shellfish aquaculture is prohibited on PSFAs.

Declassifying PSFA

While increasing aquaculture opportunities, Ch. 173, Acts of 2009, directed the Department to set aside areas for the public fishery based on specific criteria. The proposed action also describes the process by which a person would petition the Department to declassify a PSFA. A petition for declassification may be approved if the results of a biological survey indicate that the area is no longer viable for the commercial fishery. The Department will also take into consideration oyster harvest reports and other information, including public input at scoping and leasing public meetings and during comment periods, that it deems necessary to make an informed decision about declassifications. A PSFA will not be declassified for use as a demonstration lease.

Modifications from Original Proposal

The proposed action is a result of modifications made to the draft proposed PSFAs released for public review on December 3, 2009, based upon an extensive public participation process that included four 8-hour open houses located across the State where the public could attend and learn about the draft proposal, pose questions, and provide comments. The Department also obtained public input through meetings of its Oyster Advisory Commission, Sport and Tidal Fisheries Advisory Commissions, and Department of Agriculture's Aquaculture Coordinating Council, and several meetings with representatives of the State's fishing industry organizations (Maryland Watermen's Association, Chesapeake Bay Commercial Fishermen's Association, and Maryland Oystermen's Association), county oyster committees, sport fishing organizations, state aquaculture agencies, scientific community and environmental advocacy organizations. Furthermore, there were extensive public deliberations on this issue with legislators and the public during the 2010 Session of the General Assembly. A modification was made to the original proposal in order to retain 16 oyster bars (over 1,000 acres total) as PSFAs rather than making them available for leasing. This modification was based upon information provided by the traditional public oyster industry that indicated these areas are of current use by the industry.

Since the Secretary of Natural Resources only has authority to prohibit submerged land leasing in designated PSFAs, the Maryland Department of the Environment will submit a companion regulatory change to prohibit water column (cage and float aquaculture) leasing on PSFAs in the mainstem of the Chesapeake Bay.

Comparison to Federal Standards

There is no corresponding federal standard to this proposed action.

Estimate of Economic Impact

I. Summary of Economic Impact. The proposed action has an economic impact on the Agency.

| II. Types of Economic Impact. | Revenue (R+/R-) | Magnitude |
|---|-------------------------|----------------|
| | Expenditure (E+/E-) | |
| A. On issuing agency: Declassification surveys | (E+) | Indeterminable |
| B. On other State agencies: | NONE | |
| C. On local governments: | NONE | |
| | Benefit (+) Cost (-) | Magnitude |
| D. On regulated industries or trade groups: | NONE | |
| E. On other industries or trade groups: | NONE | |
| F. Direct and indirect effects on public: | NONE | |

- D. On regulated industries or trade groups: NONE
- E. On other industries or trade groups: NONE
- F. Direct and indirect effects on public: NONE

III. Assumptions. (Identified by Impact Letter and Number from Section II.)

A. Additional costs will be associated with the biological survey of PSFAs associated with the new density threshold for declassifying of PSFAs of one oyster per square meter.

Economic Impact on Small Businesses

The proposed action has minimal or no economic impact on small businesses.

Impact on Individuals with Disabilities

The proposed action has no impact on individuals with disabilities.

Opportunity for Public Comment

Comments may be sent to Oyster and Aquaculture Plan — Comment, Regulatory Staff, Maryland Department of Natural Resources Fisheries Service, 580 Taylor Ave., B-2, Annapolis, MD 21401, or call 410-260-8260, or email to fisheriespubliccomment@dnr.state.md.us, or fax to 410-260-8310. Comments will be accepted through August 16, 2010.

Public hearings will be held concerning the adoption of this proposal on:

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- July 22 at 6 p.m. at Salisbury University, Caruthers Hall Auditorium, 1101 Camden Ave., Salisbury, MD 21801; and
- August 5 at 6 p.m. at the Chesapeake College, Rufus M. and Loraine Hall Todd Performing Arts Center, located at corner of Rte. 50 and Rte. 213, Wye Mills, MD 21679.

Sign language interpreters and other appropriate accommodations for individuals will be provided upon request.

Editor's Note on Incorporation by Reference

Pursuant to State Government Article, §7-207, Annotated Code of Maryland, the Public Shellfish Fishery Areas of the Chesapeake Bay and Its Tidal Tributaries (September 2010) has been declared a document generally available to the public and appropriate for incorporation by reference. For this reason, it will not be printed in the Maryland Register or the Code of Maryland Regulations (COMAR). Copies of this document are filed in special public depositories located throughout the State. A list of these depositories was published in 37:1 Md. R. 9 (January 4, 2010), and is available online at www.dsd.state.md.us. The document may also be inspected at the office of the Division of State Documents, 16 Francis Street, Annapolis, Maryland 21401.

.17 Public Shellfish Fishery Area.

A. Public Shellfish Fishery Areas of the Chesapeake Bay and Its Tidal Tributaries (September 2010) designates public shellfish fishery areas in the Chesapeake Bay and its tidal tributaries and is hereby incorporated by reference.

B. Declassification.

(1) *A person may petition the Department to declassify a portion of a public shellfish fishery area by submitting a lease application as described in COMAR 08.02.23.03A or B and Natural Resources Article, §4-11A-08, Annotated Code of Maryland.*

(2) *The declassification of a public shellfish fishery area may be approved:*

(a) *If the results of a biological survey conducted by the Department or a designated agent show that the average density of oysters per square meter is equal to or below the maximum threshold of one oyster that is 1 inch or greater per square meter;*

(b) *After commercial harvest activity and other quantitative data is considered by the Department;*

(c) *If the lease application meets the requirements of COMAR 08.02.23.03; and*

(d) *If the lease application is approved in accordance with Natural Resources Article, Title 4, Subtitle 11A, Annotated Code of Maryland.*

JOHN R. GRIFFIN
Secretary of Natural Resources

Subtitle 02 FISHERIES SERVICE**Notice of Proposed Action**

[10-178-P]

The Secretary of Natural Resources proposes to:

(1) Repeal Regulations .06, .11, and .12 under **COMAR 08.02.08 Shellfish—General**;

(2) Amend Regulations .01 and .03 under **COMAR 08.02.14 Aquaculture Permits**; and

(3) Amend and recodify existing Regulation .01 to be Regulation .02 and adopt new Regulations .01, .03, .04, .06, and .07 under **COMAR 08.02.23 Shellfish Aquaculture and Leasing**.

Statement of Purpose

The purpose of this action is to implement regulations in order to create a shellfish aquaculture and leasing system under the requirements of Ch. 173, Acts of 2009. Additionally, Ch. 173, Acts of 2009, required that the Department streamline the regulatory process for shellfish aquaculture, open new areas to leasing to promote shellfish aquaculture industry growth, and provide alternative economic opportunities for watermen. This legislation was developed with broad stakeholder involvement and was passed unanimously by the General Assembly as a result of Governor Martin O'Malley's lease law legislation, Senate Bill 271.

Aquaculture is now the predominant means of shellfish harvesting around the world and the proposed action will facilitate the development of aquaculture leasing in Maryland. Just next door in Virginia, privatized shellfish aquaculture has quickly grown to a multi-million dollar annual business. In comparison, numerous obstacles prevented Maryland from transitioning towards aquaculture until the 2009 General Assembly approved the aquaculture lease law reform bill. The scientific findings of a 6-year state/federal Programmatic Environmental Impact Statement (PEIS) that concluded in June 2009, and recommendations from Maryland's Oyster Advisory Commission and Aquaculture Coordinating Council conclude that privatized aquaculture will provide Maryland with the best opportunity to once again become a major contributor in the worldwide oyster industry. The proposed action is critically needed as the Chesapeake Bay's oyster population is less than 1% of historical abundance and 80% of the productive oyster bar habitat in the Bay has been lost in the past 25 years. In response, Maryland's public oyster industry over the past 25 years has experienced a 90% decrease in harvest, 75% decrease in oyster harvesters, and 80% decrease in oyster processing companies.

Expanding from a public fishery to include privatized aquaculture has proven to be a major economic contributor to local economies across the world. By opening more areas to aquaculture leasing in Maryland, we hope to unleash the entrepreneurial spirit of watermen and other business people, and generate additional tax revenues associated with a more robust oyster industry. Based on an economic analysis by the University of Maryland Sea Grant, expanding aquaculture in Maryland is projected to create and sustain 250 jobs and have a \$25 million economic benefit to Maryland over the next several years. To accomplish this, the Department will provide technical and financial resources to help watermen and other interested persons establish aquaculture businesses. Funding will be available for the establishment of remote larvae setting, facilities, preparation of lease bottoms, purchase of hatchery seed, and training.

This action will make thousands acres of bottom, previously off-limits, available for leasing, including 95,000 acres of natural oyster bars that are no longer utilized by the commercial oyster fishery. The development of a new aquaculture program, along with the implementation of an expanded sanctuary network and a more scientifically managed public oyster fishery, will set forth the necessary strategies to achieve the goal of restoring an abundant, self-sustaining native oyster population to the Chesapeake Bay and its tidal tributaries and revitalizing Maryland's oyster industry. Achievement of this oyster goal will provide sustainable ecological, economic, and cultural resource benefits for the Bay and for Maryland citizens.

The proposed action clarifies the scope of the chapter and renames COMAR 08.02.14 Aquaculture in order to ensure that it does not apply to shellfish aquaculture on leased and licensed areas under COMAR 08.02.23 Leasing. The proposed action also adds a purpose regulation to the leasing chapter and clarifies and adds definitions as needed.

Process and Permitting

The proposed action describes lease procedures for: submerged land leases, including a \$300 application fee and rent per acre per year of \$3.50; water column leases, in an aquaculture enterprise zone, including a \$150 application fee and rent per acre per year of \$40; and demonstration leases, including no application fee or rent. The action requires certain individuals, except those with demonstration leases, to obtain a Shellfish Aquaculture Harvester Permit. The proposed action establishes reporting requirements, including a requirement to report annually by December 31. The action lists locations prohibited to leasing and prohibited activities, including the requirement to obtain the Department's authorization when adding fill or sediment to a lease. The action describes the requirements for

marking a lease and gear placed on a lease, including the liability for that gear. The action allows for the transfer and surrender of a lease.

The proposed action creates a Shellfish Aquaculture Harvester Permit (SAHP), which is required for an individual with a tidal wetlands license or a lease prior to engaging in aquaculture activities. The permit is valid for one year and is renewable, but not transferable. The action establishes an application process for the SAHP including requiring the listing of individuals performing aquaculture activities on a leased or licensed area. Individuals listed under the SAHP will be called permit registrants and will be issued a Shellfish Aquaculture Harvester Registration Card (SAHRC). The action requires monthly harvest reporting for SAHP holders. The action requires the SAHRC holders to keep the card in their possession while performing aquaculture activities. The action requires SAHP or SAHRC holders to abide by National Shellfish Sanitation Program (NSSP) requirements under the NSSP Model Ordinance. One of the requirements of the Model Ordinance is to tag containers of shellfish being sold for human consumption. The Department intends to add a tagging requirement by regulation in a future proposal after the details of tagging are determined. The action requires written permission to possess undersized oysters outside of a lease. The Department is committed to responding to these written permission requests within 2 business days. The action requires oysters harvested for human consumption to be at least 3 inches and sold to an oyster buy station. The aquaculture industry has expressed an interest for a smaller minimum size limit for aquaculture. This, however, is prohibited by current Maryland statute (Natural Resources Article, §4-1015, Annotated Code of Maryland). The Department is open to this request and plans to work with the Maryland Department of Agriculture to determine if a legislative change should be pursued in the 2011 Session of the General Assembly. Failure to comply with the NSSP compliance requirements will result in the public and private oyster fishery being closed.

Coastal Bays

The proposed action establishes pre-approved leasing areas in the Coastal Bays. These areas are in Chincoteague Bay and are named South Point Shoal and Whale Gizzard Shoal. A pre-approved leasing area means an area of the Atlantic coastal bays approved for leasing of submerged land by the Department. Leases in these areas are subject to all leasing and permit requirements. Water column leases (on bottom cages and float aquaculture) are not permitted on a pre-approved leasing area. Leases outside of these pre-approved areas may be approved on specific application and reviewed by the Department.

Penalties

Finally, the proposed action creates penalties for certain shellfish violations by a leaseholder, tidal wetlands license holder, or SAHRC holder.

Access

The proposed regulations allow for normal fishing activities in a leased area, including commercial crabbing and recreational fishing as long as the fishing activity does not destroy or damage shellfish or gear which may be placed there.

Modifications from Original Proposal

The proposed action is a result of modifications made to the draft aquaculture lease proposal released for public review on December 3, 2009, based upon an extensive public participation process that included four 8-hour open houses located across the State where the public could attend and learn about the draft proposal, get their questions answered, and provide comments. The Department also obtained public input through meetings of its Oyster Advisory Commission, Sport and Tidal Fisheries Advisory Commissions, and Maryland's Aquaculture Coordinating Council, and several meetings with representatives of the State's fishing industry organizations (Maryland Watermen's Association, Chesapeake Bay Commercial Fishermen's Association, and Maryland Oystermen's Association), county oyster committees, sport fishing organizations, state aquaculture agencies, scientific community, and environmental advocacy organizations. Furthermore, there were extensive public deliberations on

this issue with legislators and the public during the 2010 Session of the General Assembly. Modifications include:

- Clarification of access issues on aquaculture lease areas for commercial crabbing and recreational fishing.
- Agreement by the Maryland Department of the Environment (MDE) to submit companion regulatory changes to prohibit off bottom aquaculture in designated natural oyster bars in the mainstem of Chesapeake Bay to mitigate potential user conflicts with sports fishermen
- Agreement to establish an interested parties list or other appropriate mechanism, by DNR (for bottom leasing) and MDE (for off-bottom leasing), for individuals who want to be notified of aquaculture permit applications. This will ensure that those interested can provide input during the permit review process.
- Reduction of the South Point Shoal pre-approved lease area in Maryland's coastal bays by 50%. The modification extended the distance of this lease area from the South Point shoreline from 1/2 mile to 1 mile.
- Water column lease rental fees in aquaculture enterprise zones were discounted by 50% based upon the recommendations of the Aquaculture Coordinating Council.

Comparison to Federal Standards

There is no corresponding federal standard to this proposed action.

Estimate of Economic Impact

I. Summary of Economic Impact. The proposed action has an economic impact on agency and regulated industries.

| II. Types of Economic Impact | Revenue (R+/R-) | Magnitude |
|--|-------------------------|----------------|
| | Expenditure (E+/E-) | |
| A. On issuing agency: | | |
| (1) Increase in the number of leases | (R+) | Indeterminable |
| (2) Aquaculture expansion | (E+) | Indeterminable |
| B. On other State agencies: | | |
| Center for Environmental Science (UMCES) | (R+) | Indeterminable |
| C. On local governments: | | |
| | NONE | |
| | Benefit (+) Cost (-) | Magnitude |
| D. On regulated industries or trade groups: | | |
| Oyster Aquaculturalists | (+) | Indeterminable |
| E. On other industries or trade groups: | | |
| (1) Oyster hatcheries | (+) | Indeterminable |
| (2) Cultch suppliers | (+) | Indeterminable |
| (3) Oyster harvesters | (-) | Indeterminable |
| (4) Oyster shucking houses | (+) | Indeterminable |
| (5) Seafood Restaurants | (+) | Indeterminable |
| F. Direct and indirect effects on public: | | |
| | (+) | Indeterminable |

III. Assumptions. (Identified by Impact Letter and Number from Section II.)

A(1). An increase in leased bay waters for aquaculture enterprises will increase the amount of revenue generated by the MD DNR. For bottom leases this increase in revenue amounts to \$3.50/acre, while for water column leases in the Aquaculture Enterprise Zones (AEZ) the lease is \$40/acre. In addition there is a \$300 (\$150 in AEZs) non-refundable application fee incurred by anyone looking to rent acreage for aquaculture purposes. The number of additional acres which can be expected to be leased is unclear at the moment, particularly as the requirements for the active use of leased lands could decrease the total number of leases in the short term. Regardless, the overall magnitude of the revenue increase is expected to be minimal. The existing DNR public oyster hatchery will likely see demand increase for larvae and seed oysters that can be sold to private lease holders.

A(2). The expansion of aquaculture will increase the administrative costs associated with permitting and validation of leased land, including the assessment of disease presence and damage, the enforcement of regulations governing oyster aquaculture in the bay, and basic administrative costs associated with oyster aquaculture management. To the extent that oyster aquaculture activities supplement spat set on sanctuary bars, the cost of reef rehabilitation could be somewhat attenuated. However, this cost decrease is expected to be minimal, particularly in the near future, and not noticeably impact the overall increase in expenditures necessary to expand oyster sanctuaries. The increase in oyster aquaculture will lead to an increase in demand for cultch, and, considering this is a limiting input to restoration and rehabilitation, the cost of these undertakings will also increase.

B. The existing UMCES public oyster hatchery will likely see demand increase for larvae and seed oysters that can be sold to private lease holders.

D. An increase in areas available to oyster aquaculture and a streamlining of the permitting process will help aquaculturalists entering the sector. Pre-approved lease areas in Maryland's coastal bays at South Point Shoal and Whale Gizzard Shoal will lower the fixed costs of entering into the aquaculture sector. Aquaculturalists will face increased costs associated with the opportunity cost of time required to obtain a Shellfish Aquaculture Harvester Permit and meet new reporting requirements; however, these costs are expected to be minimal and greatly outweighed by the benefits of the new regulations. Preliminary projections suggest that the annual revenue to oyster aquaculturalists could be \$9.5 million a year, with an associated creation of 225 full-time equivalent jobs. The total annual impact on the Maryland economy from an increasing size of the oyster aquaculture sector is projected to be \$25 million a year.

E(1). Private oyster hatcheries and nurseries will see an increase in demand for larvae and seed oysters. The magnitude of the increase in demand will depend on the increase in oyster aquaculture enterprises.

E(2). Private cultch suppliers will also see an increase in demand for their product. The magnitude of the increase in demand will depend on the increase in oyster aquaculture enterprises.

E(3). The increase in supply of oysters may lead to a very small decline in the ex-vessel price of oysters. However, this price decline is expected to be very minimal due to the small change in overall supply of oysters that aquaculturalists can be expected to produce in the immediate timeframe. In addition, aquaculturalists can sell their oysters outside the public commercial fishery's harvest season, garnering a higher price for their oysters and lessening competition with the commercial fishery. The effects of the oil spill from an offshore drilling rig in the Gulf of Mexico on April 20, 2010, will be the dominant factor affecting oyster prices over the next several years.

E(4). The increase in supply of oysters will benefit oyster shucking houses in Maryland, by supplementing the supply imported from other regions.

E(5). Because the supply of oysters from aquaculture enterprises will represent such a small component of the overall supply of oysters to the area, the benefits to MD seafood restaurants can be assumed to be minimal. A larger impact can be gained if local oysters are successfully marketed as a premium product and demand a higher price.

F. Public benefits stem from numerous sources including:

(1) Reductions in water turbidity (particularly reductions in pollution and algal blooms), leading to increased potential for recreational activities (boating, swimming, scuba, etc.) within Chesapeake Bay.

(2) Increased availability of recreational sportfish, blue crabs, and oysters.

Economic Impact on Small Businesses

The proposed action has a meaningful economic impact on small business. An analysis of this economic impact follows.

The proposed action has an economic impact on the agency and regulated industries

Impact on Individuals with Disabilities

The proposed action has no impact on individuals with disabilities.

Opportunity for Public Comment

Comments may be sent to Oyster and Aquaculture Plan - Comment, Regulatory Staff, Maryland Department of Natural Resources Fisheries Service, 580 Taylor Ave., B-2, Annapolis, MD 21401, or call 410-260-8260, or email to fisheriespubliccomment@dnr.state.md.us, or fax to 410-260-8310. Comments will be accepted through August 16, 2010.

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Sign language interpreters and other appropriate accommodations for individuals will be provided upon request.

08.02.14 Aquaculture Permits

Authority: Natural Resources Article, §§ 4-11A-02 and 4-11A-11, Annotated Code of Maryland

.01 Scope.

This chapter applies to the collection, permitting, possession, production, processing, marking, transporting, purchase, or sale of fish or aquatic plants, *except for shellfish aquaculture on a leased or licensed area as described in COMAR 08.02.23*, which are the products of, or intended to be used for, aquaculture as that term is defined in Natural Resources Article, §4-11A-01, Annotated Code of Maryland.

.03 Definitions.

[A.] (proposed for repeal)

A. In this chapter, the following terms have the meanings indicated.

B. (text unchanged)

08.02.23 Shellfish Aquaculture and Leasing

Authority: Natural Resources Article, §§4-215, 4-1103, 4-11A-02, [4-11A-04,] 4-11A-05, [4-11A-06,] 4-11A-07, 4-11A-08, 4-11A-09, [4-11A-10, 4-11A-12, 4-11A-13, and 4-11A-15] 4-11A-11, and 4-11A-18, Annotated Code of Maryland

.01 Purpose.

This chapter applies to shellfish aquaculture in waters of the State as described in Natural Resources Article, Title 4, Subtitle 11A, Annotated Code of Maryland.

[.01] .02 Definitions.

[A.] (proposed for repeal)

A. In this chapter, the following terms have the meanings indicated.

B. Terms Defined.

(1) "Aquaculture activities" means those activities which include the purchase, monitoring, bottom preparation, planting, sale, possession, harvest, production, breeding, transportation, and processing of shellfish in State waters on or in an area used for shellfish cultivation.

[(1)] (2) — [(6)] (7) (text unchanged)

(8) "Pole" means a buoy, float, or stake used to mark a leased oyster bottom.

[(7)] (9) — [(8)] (10) (text unchanged)

(11) "Tidal wetlands license" means written authorization by the Board of Public Works under Environment Article, §16-202, Annotated Code of Maryland, to dredge, fill, construct structures, or conduct certain other activities involving State tidal wetlands for shellfish aquaculture.

[(9)] (12) (text unchanged)

.03 Lease Procedures.

A. Aquaculture Activities on Submerged Land. Prior to engaging in aquaculture activities on submerged land in waters of the State, including the areas listed in Regulations .05 and .06 of this chapter, a person shall:

(1) Apply for:

(a) A submerged land lease by submitting an application on a form provided by the Department; and

(b) A shellfish aquaculture harvester permit as described in Regulation .04 of this chapter; and

(2) Submit a non-refundable fee of:

(a) \$300 for areas not in aquaculture enterprise zones as described in Regulation .05 of this chapter; or

(b) \$150 for areas in aquaculture enterprise zones as described in Regulation .05 of this chapter.

B. Aquaculture Activities in the Water Column. Prior to engaging in aquaculture activities in the water column of:

(1) Aquaculture enterprise zones listed in Regulation .05 of this chapter, a person shall:

(a) Apply for:

(i) An aquaculture lease by submitting an application on a form provided by the Department; and

(ii) A shellfish aquaculture harvester permit as described in Regulation .04 of this chapter; and

(b) Submit a non-refundable fee of \$150; or

(2) Waters of the State not listed in Regulation .05 of this chapter, a person shall apply for a:

(a) Shellfish aquaculture harvester permit as described in Regulation .04 of this chapter; and

(b) Tidal wetlands license as described in Environment Article, Title 16, Subtitle 2, Annotated Code of Maryland.

C. Demonstration Lease.

(1) A person may apply for a demonstration lease on a form provided by the Department as described in Regulation .03A and B of this chapter.

(2) There are no application or rental fees for a demonstration lease.

D. Reporting. A leaseholder shall submit to the Department an annual report on a form provided by the Department not later than December 31.

E. Rent.

(1) Except as provided in §E(3) of this regulation, the rental rate for a submerged land lease is \$3.50 per acre per year and is due in full to the Department by December 31 of the preceding year.

(2) Except as provided in §E(3) of this regulation, the rental rate for a water column lease in areas listed in Regulation .05 of this chapter is \$40 per acre per year and is due to the Department by December 31 of the preceding year.

(3) The rental rate for the first year of a lease may be prorated and is due in full to the Department within 30 days of lease approval.

F. Locations. In addition to restrictions provided in Natural Resources Article, Title 4, Subtitle 11A, Annotated Code of Maryland, a lease may not be located in:

(1) Waters classified as restricted by the Maryland Department of the Environment unless the person:

(a) Provides proof to the Department of a viable relay location; or

(b) Has a demonstration lease;

(2) Assateague Island National Seashore as described in 16 U.S.C. §459f; or

(3) A sanctuary as established in COMAR 08.02.04.15A.

G. Prohibited Activities.

(1) A leaseholder may not make any alteration which includes adding any type of fill or sediment other than shell to the existing condition of the lease without first obtaining the Department's written consent.

(2) Shell present in the leased area at the time the lease is issued may not be removed from the leased area without the written permission of the Department.

H. Marking a Lease. A leaseholder shall:

(1) Place a minimum of four poles at the corners of the lease perimeter;

(2) Mark each pole with an 8-inch by 12-inch marker displaying only the initials or name of the leaseholder and the lease number; and

(3) Maintain and meet any standards for corner marker structures as required by the Department in documents available on its website.

I. Gear.

(1) All equipment, gear, or manmade material placed on the lease shall be permanently and individually marked with the lease number and name of the leaseholder.

(2) The leaseholder shall be responsible and liable for equipment, gear, or material:

(a) That has been found adrift or unattended outside the boundaries of the lease area; or

(b) Remaining on the lease after the surrender, default, abandonment, or termination of the lease.

J. Transfer of Lease.

(1) A leaseholder may apply to transfer a lease by completing forms provided by the Department.

(2) Prior to receiving approval of a transfer, the person receiving a transferred lease shall complete a lease application and a shellfish aquaculture harvester permit application and submit the required forms with the transfer form described in §J(1) of this regulation.

K. Surrender of a Lease. A lease may be surrendered by completing a form provided by the Department.

.04 Shellfish Aquaculture Harvester Permit

A. A lease applicant, a lease transfer applicant, a tidal wetlands license applicant, or an individual as described in Natural Resources Article, §4-11A-16, Annotated Code of Maryland, shall submit an application for a shellfish aquaculture harvester permit prior to engaging in aquaculture activities.

B. A shellfish aquaculture harvester permit:

(1) Shall be valid for a 1-year term beginning on January 1 and expiring on December 31 each year;

(2) Shall be automatically renewed for a new term upon receipt of all reports required under Regulation .03D of this chapter; and

(3) Is not transferable.

C. Application. An application shall:

(1) Be submitted on a form provided by the Department; and

(2) Include a list of all individuals who may be engaging in aquaculture activities within the area described in the applicant's lease application or tidal wetlands license application.

D. Reporting. A person who is permitted by the Department under this regulation shall submit a monthly aquaculture harvest activity report on forms provided by the Department by the 10th day following the end of each month.

E. Permit Registrants.

(1) An individual engaged in aquaculture activities on the area described in the permit applicant's lease or tidal wetlands license application shall be:

(a) Named as a permit registrant under the shellfish aquaculture harvester permit; and

(b) Issued a shellfish aquaculture harvester registration card by the Fisheries Service.

(2) A shellfish aquaculture harvester permittee shall immediately notify the Department of any changes to the list of named permit registrants on a form provided by the Department.

(3) A shellfish aquaculture harvester registration card shall be issued to each shellfish aquaculture harvester permittee.

F. A shellfish aquaculture harvester permittee or permit registrant:

(1) Shall be in possession of the individual's shellfish aquaculture harvester registration card while engaged in aquaculture activities on a leased area;

(2) Shall harvest in accordance with the National Shellfish Sanitation Program Model Ordinance that is incorporated by reference in COMAR 10.15.07.01A;

(3) Except as provided in §F(4) of this regulation, may not harvest oysters that are less than 3 inches from hinge to bill;

(4) Shall have written permission from the Department if in possession of undersized shellfish outside of the leased or licensed area; and

(5) May only sell oysters to an oyster buying station, designated under COMAR 08.02.08.02B, unless that person has written permission from the Department.

.06 Pre-Approved Leasing Areas in the Coastal Bays.

A. The following areas are established as pre-approved leasing areas.

B. A "pre-approved leasing area" means an area of the Atlantic coastal bays approved for leasing of submerged land by the Department.

C. Areas Defined.

(1) South Point Shoal. All of the waters Chincoteague Bay enclosed by a line beginning at a point at or near Lat. 38°10.860' N, Long. 75°13.379' W; then running 310° True to a point at or near Lat. 38°10.980' N, Long. 75°13.560' W; then running 19° True to a point at or near Lat. 38°12.060' N, Long. 75°13.079' W; then running

112° True to a point at or near Lat. 38°11.768' N, Long. 75°12.145' W; then running 227° True to the point of beginning.

(2) Whale Gizzard Shoal. All of the waters Chincoteague Bay enclosed by a line beginning at a point at or near Lat. 38°5.288' N, Long. 75°15.311' W; then running 271° True to a point at or near Lat. 38°5.303' N, Long. 75°16.148' W; then running 4° True to a point at or near Lat. 38°5.775' N, Long. 75°16.106' W; then running 76° True to a point at or near Lat. 38°5.932' N, Long. 75°15.288' W; then running 182° True to the point of beginning.

.07 General

A. Penalties. A shellfish aquaculture harvester permit or a shellfish aquaculture harvester registration card may be revoked or suspended by the Department if the individual:

(1) Receives a violation under:

(a) This chapter;

(b) Natural Resources Article, Title 4, Subtitle 11A, Annotated Code of Maryland; or

(c) Environment Article, Title 16, Subtitle 2, Annotated Code of Maryland; or

(2) Receives a conviction for taking oysters:

(a) From a location more than 150 feet within a closed or prohibited area;

(b) With illegal gear;

(c) More than 2 hours after sunset or anytime before sunrise; or

(d) During the closed season.

B. Fishing in a Leased Area. Fishing is permitted in a leased area if the fishing activity does not destroy or damage shellfish or gear which may be planted there.

JOHN R. GRIFFIN
Secretary of Natural Resources

Title 10 DEPARTMENT OF HEALTH AND MENTAL HYGIENE

Subtitle 09 MEDICAL CARE PROGRAMS

Notice of Proposed Action

[10-182-P]

The Secretary of Health and Mental Hygiene proposes to amend:

(1) Regulations .04, .09, and .10 under **COMAR 10.09.24 Medical Assistance Eligibility**; and

(2) Regulation .03 under **COMAR 10.09.54 Home/Community Based Services Waiver for Older Adults**.

Statement of Purpose

The purpose of this action is to clarify the reasonable limits the Department of Health and Mental Hygiene will impose on considering the costs of medical expenses and remedial care incurred by Medical Assistance long-term care and Home/Community Based Services Waiver for Older Adults applicants' contribution to the cost of their care.

Comparison to Federal Standards

There is no corresponding federal standard to this proposed action.

Estimate of Economic Impact

The proposed action has no economic impact.