

**Maryland General Assembly
Department of Legislative Services**

**Proposed Regulation
Department of Natural Resources**
(DLS Control No. 15-408)

Overview and Legal and Fiscal Impact

The regulation authorizes the Secretary of Natural Resources, in order to implement the Chesapeake Bay Oyster Management Plan, and in cooperation with the appropriate oyster committee, to issue a public notice to establish or modify an oyster season or catch limit, or open or close portions of the Public Shellfish Fishery Area.

The regulation presents no legal issues of concern, but additional comments have been included in the *Special Notes* section below for the Joint Committee on Administrative, Executive, and Legislative Review's consideration.

There is no material fiscal impact on State or local agencies.

Regulation of COMAR Affected

Department of Natural Resources:

Fisheries Service: Oysters: COMAR 08.02.04.11

Legal Analysis

Background

In response to the oyster population in the Chesapeake Bay languishing at 1% of historic levels, decreased suitable oyster habitat, a dwindling number of harvesters, and the recommendations of the State's Oyster Advisory Commission, the Department of Natural Resources unveiled a new management and restoration plan for oysters and the State's oyster industry in December 2009. The plan increased the State's network of oyster sanctuaries from 9% to 24% of the bay's remaining quality oyster bars, established oyster aquaculture leasing opportunities and related financial assistance programs, and maintained 76% of the bay's remaining quality oyster habitat for the public oyster fishery. The department's oyster restoration activities also included the construction of artificial oyster reefs, increased production of juvenile oysters, and the promotion of oyster aquaculture.

Summary of Regulation

The regulation repeals provisions that authorize the Secretary to adopt regulations to establish or modify a season for taking oysters, or a daily catch limit on the quantities of oysters

which may be caught from the natural oyster bars of the State to conserve the public resource, provided that notice of the establishment or modification is made in a daily newspaper of general circulation not less than 1 week before the effective date.

The regulation also authorizes the Secretary, in order to implement the Chesapeake Bay Oyster Management Plan, and in cooperation with the appropriate oyster committee, to issue a public notice to establish or modify an oyster season or catch limit, or open or close portions of the Public Shellfish Fishery Area. The public notice must state its effective hour and date and be published on the Fisheries Service website at least 48 hours in advance of the effective hour and date. For enforcement purposes, a violation of the restrictions set by the Secretary in accordance with these provisions is a violation of the regulation.

Legal Issues

The regulation presents no legal issues of concern.

Statutory Authority and Legislative Intent

The department cites § 4-215 of the Natural Resources Article as statutory authority for the regulation. Specifically, § 4-215(b)(6) requires the department to prepare a fishery management plan for oysters. Additionally, § 4-215(i) provides that once a fishery management plan has been adopted by regulation, the State's fishery resources shall be harvested in accordance with the conservation and management measures in the fishery management plan and any regulations implementing or amending that plan, notwithstanding any other provision of Title 4 (except § 4-1002, which pertains to dredging for clams or oysters in the Atlantic Coastal Bays).

This authority is correct and complete. The regulation complies with the legislative intent of the law.

Special Notes

In a 2013 letter to the chair of the committee, the Attorney General concluded that the department has the authority under § 4-215 of the Natural Resources Article to adopt regulations that allow certain fisheries management actions to be taken by public notice. However, the Attorney General encouraged the General Assembly to consider making clear the precise contours of the department's public notice authority. Two cross-filed bills, SB 145/HB 145 were introduced in the 2014 legislative session to clarify the department's authority with regard to implementing fisheries management actions through public notice (such as posting on the department website), rather than through notice and comment rulemaking procedures established by the Administrative Procedure Act. SB 145 was withdrawn following a hearing before the Senate Education, Health, and Environmental Affairs Committee and HB 145 was referred to interim study by the House Environmental Matters Committee. There was no legislation on this issue in the 2015 legislative session.

Fiscal Analysis

There is no material fiscal impact on State or local agencies.

Agency Estimate of Projected Fiscal Impact

The department advises that the regulation has no impact on State or local governments. The Department of Legislative Services generally concurs. Closing and opening portions of a Public Shellfish Fishery Area may impact costs (for buoys, if needed, to mark closed areas) and oyster tax revenues. Based on the current interest of county oyster committees in closing portions of a Public Shellfish Fishery Area, however, any such impacts are not expected to be material.

Impact on Budget

There is no impact on the State operating or capital budget.

Agency Estimate of Projected Small Business Impact

The department advises that the regulation has a meaningful economic impact on small businesses in the State. The Department of Legislative Services concurs. The ability to open and close portions of a Public Shellfish Fishery Area is intended as a beneficial option for the county oyster committees that can allow for more efficient harvesting by commercial harvesters and greater harvest value.

Contact Information

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