

TO: THE MEMBERS OF THE HOUSE ENVIRONMENT AND TRANSPORTATION
COMMITTEE

WRITTEN TESTIMONY OF RUSSELL C. DASHIELL, JR.
IN SUPPORT OF HOUSE BILL NO. 1153

I am herewith submitting my written testimony in support of House Bill No. 1153-Tidal Fish License-Oyster Authorization-Revocation, which is being considered by your Committee.

By way of introduction, my name is Russell C. Dashiell, Jr. I was born and raised in Salisbury, Maryland and I have been a practicing lawyer on the Lower Eastern Shore of Maryland for 44 years. A good portion of my practice involves Natural Resources related matters and the representation of watermen, before the Office of Administrative Hearings, the District Courts of Maryland and the Circuit Courts of all of the middle and lower counties of the Eastern Shore. I have probably tried in excess of 150 Natural Resources cases over the years and I am acutely familiar with the operation and effect of Natural Resources Article, § 4-1210, Oyster Poaching. The process of representing Defendants changed under this section is roughly as follows:

First, a waterman is charged by the NRP, of among other things, harvesting or attempting to harvest oysters in a sanctuary or in using unauthorized gear in certain areas. An example of the later would be using a power dredge in a designated hand tong area where such equipment is forbidden.

Second, the DNR gives Notice of an Agency Action, which begins the Administrative Hearing process which seeks the single sanction permanent revocation of the waterman's Tidal Fishing License to engage in the oyster fishery.

Third, an adjudicatory hearing is held by the Office of Administrative Hearings within 90 days of the commission of the offense to determine if the DNR can establish whether the waterman knowingly committed one or more of the oyster poaching offenses. This hearing is recorded and testimony and evidence is presented under oath. The responding waterman can be represented by counsel and may ask for and receive discovery

of the facts and evidence which may be offered by the Department. The hearing is very similar to a trial except it applies only to the Department's Administrative action against the waterman's license and is not related to the underlying citation/violation entered by the NRP in the District Court County where the offense is alleged to have occurred. The trial of the citation generally does not occur until after the Administrative Hearing is held and, in many cases, decided. Another striking aspect of the OAH hearing is that the burden of proof for the Department to sustain its charges is a simple preponderance of the evidence (51 – 49 percent), a much lesser burden than even proving a violation under a citation before the District Court, which is beyond a reasonable doubt.

Fourth, if a waterman is found in knowing violation at the Administrative Hearing with its lesser burden of proof, the Department shall revoke the perpetuity his or her license to harvest oysters. The right to appeal to a Circuit Court is of limited utility because the courts give great deference to the findings of the Administrative Law Judges of the OAH.

Fifth, faced with a permanent loss of his/her ability to engage in an aspect of the oyster fishery, the waterman is barred from engaging in that part of their livelihood, which may lead to them leaving the water altogether and in some instances entering long-term unemployment.

Sixth, should the DNR prevail in the District Court citation case, then the Department may assess enough points (COMAR) against his or her license that they will be barred from working on the water in any capacity.

At some point in this process a little humanity should be allowed to intrude since all instances, all offenses and all offenders are not alike. This goes with many other of our daily affairs in the world in general. It is within this process that over the years, I have confronted cases involving this particular section and I have come to the realization that often the single sanction of permanent revocation of a TFL license as required by § 4-1210 works a draconian unfairness on the waterman charged as well as their families. An incursion into an oyster sanctuary by a waterman is certainly a serious event, however, in many cases, and many which I have

actually tried the Natural Resources Police ("NRP") have made mistakes; have placed undue reliance on faulty data from their GPS devices; and in some instances been too quick to conclude that offenses have been committed. Generally the NRP by and large does a good job, however, they do make some mistakes in the enforcement of the oyster poaching law. The sanction imposed for a first offense for intruding into a sanctuary is so serious and so long lasting that a person charged can essentially lose their livelihood, or a substantial portion of it and be driven off the water and out of the culture in which they have lived for generations. Virginia has a much more enlightened approach to these offenses and permits the re-entry of the offending waterman to the industry after a period of time.

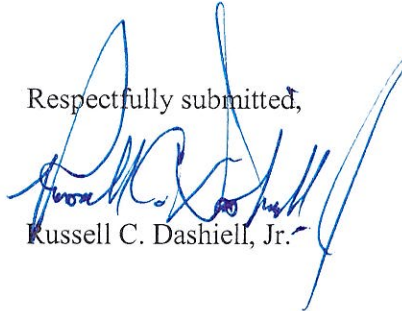
I believe that the Bill introduced by Delegate Mautz goes a long way toward making this situation much fairer and also allows the Department of Natural Resources to exercise its sole discretion to allow someone who has sought redemption and maintained a good record "post arrest" to re-enter the fishery. Five years/half a decade is a quite a long time in the life and career of a waterman to be taken out of the oyster fishery. It gives one a good amount of time to consider their actions and to reform their practices. This particular Bill will not benefit habitual poachers. The Department will simply not exercise its discretion in their favor.

On another score, I have had numerous dealings with the Department's Attorney's General, who as prosecutors of the administrative portions of NR § 4-1210 understand that not all cases are as clear cut as they may seem to be. These AGs are forced to try these cases to their limits even if they feel that are extenuating circumstances. Therefore they should be accorded the same type of prosecutorial discretion that is allowed all other prosecutors in the area of the enforcement of other criminal and administrative sanction laws. Unfortunately, I believe that in its current state, NR § 4-1210 does not allow this to happen.

Finally, in the interest of fairness and the notion that punishment should be finite and people are permitted the ability to seek redemption for their actions, I think that this Bill is a welcomed common sense step, which still at its core, allows Maryland's oyster resources to be effectively preserved.

Should you have any questions or require any further information from me in this matter, please do not hesitate to contact my office.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Russell C. Dashiell, Jr.", written over the typed name below.

Russell C. Dashiell, Jr.

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