

**Maryland General Assembly
Department of Legislative Services**

**Proposed Regulations
Department of Natural Resources**
(DLS Control No. 19-066)

Overview and Legal and Fiscal Impact

According to the Department of Natural Resources, the purpose of the regulations is to implement the Maryland Chesapeake Bay Oyster Management Plan. The regulations remove specific limitations on oyster harvests and instead authorize the department to establish and modify seasons, daily catch limits, days of the week, or times for catching oysters by issuing public notice on the department's website. The regulations also authorize the department to open or close certain oyster harvest areas by public notice, and alter the boundaries of certain areas where an auxiliary yawl boat may be used to propel an oyster dredge boat.

The regulations present no legal issues of concern. However, additional comments have been included in the *Technical Corrections and Special Notes* section of the Legal Analysis below for the consideration of the Joint Committee on Administrative, Executive, and Legislative Review (AELR Committee).

There is no fiscal impact on State or local agencies.

Regulations of COMAR Affected

Department of Natural Resources:

Fisheries Service: Oysters:
COMAR 08.02.04.02, .03, .06, .10 and .11

Legal Analysis

Background

State law requires the department to prepare fishery management plans for various listed species, including oysters. The plans contain a systematic description of a given fishery and the objectives and conservation and management measures for the fishery. Various requirements apply to both the plans and the conservation and management measures in the plans. Once a fishery management plan has been adopted by regulation, the fishery must be harvested in accordance with the conservation and management measures in the plan and any regulations implementing or amending that plan. The department's last fishery management plan for oysters was adopted in 2004 and amended in 2010.

Chapter 703 of 2016 required the department, as part of its fishery management plan for oysters, to conduct a study, in consultation with the University of Maryland Center for Environmental Science, on the oyster stock (including a stock assessment and development of biological reference points) and management strategies to address the maintenance of a sustainable oyster population and fishery. This study was completed in 2018, paving the way for the development of a new fishery management plan for oysters: the Maryland Chesapeake Bay Oyster Management Plan, which the department is proposing to adopt and incorporate by reference in regulation through a concurrent submission (*see* DLS Control No. 19-067).

The proposed new oyster management plan establishes a number of objectives, strategies, and actions for the management of the State’s oyster fishery. Notably, the plan advocates for the adaptive management of the fishery. As explained in section 2.3 of the plan:

“Adaptive management is a structured, iterative process of decision-making. It generally involves a variety of techniques that can be refined or modified based on input from monitoring results, new scientific research and data and/or improved understanding from empirical observations. [...] Adaptive management requires feedback, flexibility and the ability to adapt and make necessary changes. Implementation of adaptive management could include establishing or modifying certain parameters of the oyster fishery by public notice to allow flexibility in developing a sustainable fishery.”

Accordingly, Action 2.3.3 of the plan calls for the use of public notices “to modify oyster fishery parameters as an adaptive management measure.”

Summary of Regulations

The regulations facilitate implementation of the proposed new Maryland Chesapeake Bay Oyster Management Plan by authorizing the department to take certain management actions affecting the recreational and commercial oyster fisheries through public notice. The regulations also alter the boundaries of areas where the use of auxiliary yawl boats is prohibited.

Recreational Oyster Fishery

The regulations repeal language authorizing a resident to take up to one bushel of oysters per day on certain days and at certain times from October 1 through March 31. The regulations instead require the department, on or before July 1 of each year, to issue a public notice on the department’s website establishing the recreational season, daily catch limits, days of the week and times for catching oysters. The department may alter any of these parameters by issuing a public notice on the department’s website at least 48 hours in advance.

Commercial Oyster Fishery

The regulations repeal language establishing commercial seasons and the days of the week for catching oysters with specified gears. The regulations instead require the department, on or before July 1 of each year, to issue a public notice on the department’s website establishing, for each gear type, (1) the season for catching oysters commercially, (2) the days of the week that an

individual may catch oysters for commercial purposes, and (3) daily commercial catch limits. As with recreational harvests, the department may alter any of these parameters by issuing a public notice on the department's website at least 48 hours in advance. The regulations retain restrictions on the hours of day during which an individual may use certain commercial gear.

The regulations also define the new term "oyster harvest area" to mean "submerged ground where an individual may catch oysters," and authorize the department to open or close an oyster harvest area for the harvesting or conservation of oysters by public notice. The public notice must be posted on the department's website at least 48 hours before the change takes effect, and must state: (1) the specific area, (2) the specific period of time that the area is opened or closed, (3) daily bushel limits, and (4) the days of the week a person may catch oysters in the area. Oyster harvest areas do not include areas (1) leased for aquaculture, (2) restricted by the Maryland Department of the Environment, or (3) designated as a submerged aquatic vegetation protection zone, harvest reserve area, or sanctuary.

Dredging with an Auxiliary Yawl Boat

Maryland still has a small fleet of working skipjacks — large wooden sailboats, traditionally used for oyster dredging. Most skipjacks are equipped with an auxiliary yawl boat (more commonly referred to as a pushboat), which functions as the skipjack's engine. Although skipjacks are generally required to dredge under sail power, an auxiliary yawl boat may be used up to two days per week during the dredging season. The regulations alter the boundaries of certain areas where auxiliary yawl boats may not be used while dredging.

Legal Issues

The regulations present no legal issues of concern. However, additional comments have been included in the *Technical Corrections and Special Notes* section below for the AELR committee's consideration.

Statutory Authority and Legislative Intent

The department cites § 4-215 of the Natural Resources Article as statutory authority for the regulations. Section 4-215(b) requires the department to prepare fishery management plans for various listed species, including oysters. Section 4-215(h) requires the Secretary to adopt the proposed management plans and any proposed conservation and management measure by regulation. Section 4-215(i) provides that, notwithstanding any other provision of Title 4 of the Natural Resources Article, once a fishery management plan is adopted, the State's fishery resources are required to be harvested in accordance with the conservation and management measures in the fishery management plan and any regulations implementing or amending that plan.

This authority is correct and complete. The regulations comply with the legislative intent of the law.

Technical Corrections and Special Notes

The regulations give the department broad authority to establish and modify seasons, catch limits, and other restrictions on oyster harvests by issuing public notices on the department's website. According to the regulations, this authority applies "notwithstanding" §§ 4-1004, 4-1008.1, 4-1009, 4-1013, and 4-1015.1 of the Natural Resources Article. Thus the regulations explicitly supersede current statutory provisions regarding: recreational oyster catch limits (§ 4-1004); seasons, hours, and catch limits for individuals catching oysters with handscrapes (§ 4-1008.1); procedural requirements for establishing or amending oyster catch limits, including a requirement that the department provide one week's notice to the AELR Committee and the public before establishing or amending these catch limits (§ 4-1009); catch limits and day and hour restrictions for individuals catching oysters with dredges (§ 4-1013); and hand tonging catch limits (§ 4-1015.1).

It is likely that the department has the statutory authority for the regulations. In a 2013 letter to the Chair of the AELR Committee, the Attorney General concluded that the department likely 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. Moreover, subsection (i) of this section specifically provides that the State's fishery resources must be harvested in accordance with the conservation and management measures in a duly adopted fishery management plan and any regulations implementing or amending that plan – "notwithstanding any other provision of this title [Title 4 of the Natural Resources Article]." To the extent that the regulations implement the new oyster management plan, which explicitly calls for using public notices as an adaptive management technique, the regulations are likely consistent with the department's legal authority under § 4-215(i).

Fiscal Analysis

There is no fiscal impact on State or local agencies.

Agency Estimate of Projected Fiscal Impact

The department advises that the regulations have no impact on State or local governments. The Department of Legislative Services concurs.

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 regulations have minimal or no economic impact on small businesses in the State. The Department of Legislative Services disagrees with this assessment with respect to the portions of the regulations that allow for harvest restrictions to be set by public notice. Those provisions do not directly make changes to oyster management measures, but they

provide the department with the authority to makes changes outside of State regulations that may result in meaningful (whether positive or negative) impacts on small businesses. The character and extent of the impacts cannot be determined at this time, since it is not known what changes will be made under that authority.

Contact Information

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