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DNR-FS-2020-11

SMALL BUSINESS COMPLIANCE GUIDE
Amendment to Subtitle 02 Fisheries Service
Regarding the Department's Regulations for Oysters
COMAR 08.02.04.17
Released October 23, 2020

This Guide is prepared in accordance with the requirements of State Government Article, §10-110, Annotated Code of Maryland. It is intended to help small businesses comply with the revised rules adopted in the above-referenced sections of the Code of Maryland Regulations. This Guide is not intended to replace or supersede these rules, but to facilitate compliance with the rules. Although we have attempted to cover all parts of the rules that might be especially important to small businesses, the coverage may not be exhaustive. This Guide cannot anticipate all situations in which the rules apply.

The Department will clarify or update the text of the Guide as an idea moves through the regulatory process. Direct your comments and recommendations, or calls for further assistance, to Fishing and Boating Services Regulatory Division:

410-260-8300
410-260-8DNR; toll free in Maryland 877-620-8DNR; TTY Users Call via the Maryland Relay
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I. SUMMARY & FAQs

What is being considered?

The department would like to establish regulatory criteria that can be used to create new Public Shellfish Fishery Areas (PSFA) and expand existing PSFAs when physical, biological and economic conditions warrant maintaining these areas for public access to shellfish resources.

Issues Taken Into Consideration

The following issues/challenges were taken into consideration while determining options for an appropriate regulatory criteria.

- What characteristics support survivability and productivity of an oyster bar?
- What biological factors at a particular site should be used to determine value?
- What minimum size of a PSFA makes sense in terms of value to the environment/public?
- What conditions warrant allowing an area to be leased rather than being made a PSFA?
- Is the existing PSFA declassification criteria appropriate?

In all cases, the department will only require a survey on a proposed lease area which is located outside of an oyster sanctuary and outside of a PSFA when suitable evidence has been provided indicating the presence of oyster resources which warrant investigation (existing surveys, harvest records, etc.).

When survey results are evaluated, the decision will be based on the criteria to be established.

Criteria for expanding existing PSFAs and creating new, standalone PSFAs.

1. Areas with an average oyster density greater than or equal to 5 oysters per square meter will be considered for inclusion to an existing PSFA or creation of a new PSFA.
2. Areas with an average oyster density greater than 1 oyster per square meter and less than 5 oysters per square meter will only be considered for inclusion to an existing PSFA or creation of a new PSFA when other conditions are present which support the existence of a productive oyster bar such as exposed cultch, multiple year classes, and recent harvest information showing the area has been productive.
3. Areas with an average oyster density less than or equal to 1 oyster per square meter will not be considered for inclusion to an existing PSFA or creation of a new PSFA.

Why is this change necessary?

Existing PSFAs were identified and established in 2010 to set aside areas for the public fishery. The law requires the department to establish PSFAs (based on data and surveys) and to do so by regulation. The current regulation: a) designates the PSFAs; and b) includes a process and criteria to declassify all or a portion of a PSFA in the event an aquaculture lease is applied for within a PSFA. However, the current regulation does not set out the process to add or expand PSFAs should this be supported. The department now seeks to clarify that process and related criteria by adding it to the PSFA regulation.

Shellfish aquaculture leases cannot occur within an area designated as a PSFA, therefore an applicant seeking to lease an area within a PSFA must first seek declassification of that area pursuant to existing regulatory criteria. Leasing can occur outside of a PSFA, but there are

instances where wild oyster resources available to the public exist on a proposed lease bottom. In that situation, issuing a lease to the applicant effectively removes those resources from the public domain and makes them only available to the leaseholder for harvest and sale. To address these issues and ensure that productive oyster bars are maintained for the public fishery, the department seeks to adopt regulations clarifying the criteria for expanding and adding new PSFAs.

Who will this affect?

This affects anyone who harvests (commercial and recreational), grows (shellfish aquaculturists), or deals in oysters.

Has this change been discussed with advisory commissions or stakeholders?

Yes, it was discussed with the:

- 1) Aquaculture Coordinating Council on September 24, 2020;
- 2) Oyster Advisory Commission on October 12, 2020;
- 3) Sport Fisheries Advisory Commission on October 13; and
- 4) Tidal Fisheries Advisory Commission on October 15, 2020.

What is the specific regulatory action?

Amend Regulation .17 under COMAR 08.02.04 Oysters.

II. DEFINITIONS

A public shellfish fishery area (PSFA) is an area where the public can harvest oysters for commercial and recreational purposes. Oyster aquaculture and clamming are not allowed in PSFAs.

III. RECORDKEEPING AND REPORTING REQUIREMENTS

This action does not create new permit, recordkeeping, or reporting requirements.

IV. IMPLEMENTATION DATE

The department expects this change to be effective in the spring of 2021, however the exact date cannot be determined. The department will follow our normal scoping and proposal procedures.

This idea is in the scoping process (October 23—November 7). The goal of scoping is to identify issues, potential impacts, and reasonable alternatives associated with the issues so that management actions can be developed. After the public has had an opportunity to comment on possible management actions during the scoping process, the department considers these comments and develops an appropriate management strategy.

If the action is necessary and appropriate, the rules will be promulgated following the Administrative Procedures Act described in Title 10, Subtitle 1 of the State Government Article Annotated Code of Maryland.

- The General Assembly's Administrative, Executive, and Legislative Review Committee reviews the regulatory proposal for fiscal and legal analysis.
- The proposal is printed by the Division of State Documents in the Maryland Register.
- A 30 day public comment period begins on the day of publication.
- After review of the comments, the department may adopt the changes.
- If the department adopts the changes, they become effective after a notice is published in the Maryland Register that announces approval and the effective date.