

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2019

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HOUSE BILL 809

Short Title: Support Shellfish Aquaculture. (Public)

Sponsors: Representatives McElraft, Yarborough, Shepard, and Harrison (Primary Sponsors).

For a complete list of sponsors, refer to the North Carolina General Assembly web site.

Referred to: Agriculture, if favorable, Rules, Calendar, and Operations of the House

April 18, 2019

1 A BILL TO BE ENTITLED
2 AN ACT TO PROVIDE FURTHER SUPPORT TO THE SHELLFISH AQUACULTURE
3 INDUSTRY IN NORTH CAROLINA.

4 The General Assembly of North Carolina enacts:

5
6 **AUTHORIZE ESTABLISHMENT OF SHELLFISH AQUACULTURE ENTERPRISE**
7 **AREAS**

8 **SECTION 1.1.** G.S. 113-201.1 reads as rewritten:

9 **"§ 113-201.1. Definitions.**

10 As used in this Article:

- 11 (1) "Natural shellfish bed" means an area of public bottom where oysters, clams,
12 scallops, mussels or other shellfish are found to be growing in sufficient
13 quantities to be valuable to the public.
14 (2) "Riparian owner" means the holder(s) of the fee title to land that is bordered
15 by waters of an arm of the sea or any other navigable body of water.
16 (3) "Shellfish" means oysters, clams, scallops, mussels or any other species of
17 mollusks that the Marine Fisheries Commission determines suitable for
18 cultivation, harvesting, and marketing from public grounds and private beds.
19 (3a) "Shellfish Aquaculture Enterprise Area" means an area established pursuant
20 to G.S. 113-202(s) or G.S. 113-202.1(j).
21 (4) "Single family unit" means the husband and wife and any unemancipated
22 children in the household.
23 (5) "Water column" means the vertical extent of water, including the surface,
24 above a designated area of submerged bottom land."

25 **SECTION 1.2.** G.S. 113-202 is amended by adding a new subsection to read:

26 "(s) The Secretary may establish Shellfish Aquaculture Enterprise Areas for bottom
27 leasing pursuant to this subsection. The Secretary may establish one or more Shellfish
28 Aquaculture Enterprise Areas that comply with the requirements of this section, including the
29 notice, public hearing, and public comment requirements; any other State requirements for
30 shellfish leasing; and any applicable federal requirements. Leases issued in a Shellfish
31 Aquaculture Enterprise Area shall be nontransferable and shall revert to the State upon
32 relinquishment or termination. The Marine Fisheries Commission may adopt any rules necessary
33 to implement this subsection."

34 **SECTION 1.3.** G.S. 113-202.1 is amended by adding a new subsection to read:



1 "(j) The Secretary may establish Shellfish Aquaculture Enterprise Areas for water column
2 leasing pursuant to this subsection. The Secretary may establish one or more Shellfish
3 Aquaculture Enterprise Areas that comply with the requirements of this section, including the
4 notice, public hearing, and public comment requirements; any other State requirements for
5 shellfish leasing; and any applicable federal requirements. Requirements under this section
6 include the notice, public hearing, and public comment requirements of this section. Leases
7 issued in a Shellfish Aquaculture Enterprise Area shall be nontransferable and shall revert to the
8 State upon relinquishment or termination. The Marine Fisheries Commission may adopt any rules
9 necessary to implement this subsection."

10 **SECTION 1.4.** The Division of Marine Fisheries of the Department of
11 Environmental Quality shall identify areas in waters that are under a moratorium for shellfish
12 leasing that could potentially be established as Shellfish Aquaculture Enterprise Areas. The
13 Division shall report its findings to the General Assembly no later than April 1, 2020.
14

15 **ESTABLISH PAMLICO SOUND SHELLFISH AQUACULTURE PILOT PROJECT**

16 **SECTION 2.** Notwithstanding any other provision of law, the Secretary of
17 Environmental Quality may grant up to three shellfish cultivation leases or water column leases
18 in Pamlico Sound as provided in the pilot project established by this section. Under the pilot
19 project, each lease may be up to 50 acres in size; each lease must be separated from any other
20 lease and from the shoreline by at least 250 yards; and no person, including a corporate entity, or
21 single family unit, may hold more than 100 acres of leases. The Division of Marine Fisheries of
22 the Department Environmental Quality shall, to the extent practicable, grant leases in different
23 geographic areas of Pamlico Sound. The Division shall study the advantages and disadvantages
24 associated with leasing such areas within Pamlico Sound. In conducting this study, the Division
25 shall consult with shellfish growers, nearby riparian owners, and other users of the public bottoms
26 and waters. The Division shall submit an interim report of its findings, including any
27 recommendations, to the General Assembly no later than January 1, 2025, and a final report of
28 its findings, including any recommendations, to the General Assembly no later than January 1,
29 2030. In its final report, the Division shall include a recommendation on whether the pilot project
30 should be terminated, be made permanent, or be expanded. This section shall terminate July 1,
31 2030, and any leases granted pursuant to this section shall terminate no later than July 1, 2031.
32

33 **INCREASE PRODUCTION AND PLANTING REQUIREMENTS FOR SHELLFISH** 34 **LEASES**

35 **SECTION 3.(a)** Definitions. – For purposes of this section and its implementation:

- 36 (1) "Extensive shellfish culture" means shellfish grown on the bottom without the
37 use of cages, racks, bags, or floats.
38 (2) "Intensive shellfish culture" means shellfish grown on the bottom or in the
39 water column using cages, racks, bags, or floats.
40 (3) "Shellfish Production and Planting Requirements Rule" means 15A NCAC
41 03O .0201 (Standards and Requirements for Shellfish Bottom Leases and
42 Franchises and Water Column Leases) for purposes of this section and its
43 implementation.

44 **SECTION 3.(b)** Shellfish Production and Planting Requirements Rule. – Until the
45 effective date of the revised permanent rule that the Marine Fisheries Commission is required to
46 adopt pursuant to subsection (d) of this section, the Commission shall implement the Shellfish
47 Production Requirements Rule as provided in subsection (c) of this section.

48 **SECTION 3.(c)** Implementation. – Shellfish leases shall be terminated unless they
49 comply with the following requirements:

- 50 (1) Franchises recognized pursuant to G.S. 113-206 and shellfish bottom leases
51 shall be terminated unless:

- 1 a. They produce a minimum of 20 bushels of shellfish per acre averaged
2 over the previous three-year period beginning in year five of the lease;
3 or
4 b. For intensive culture bottom operations, the holder of the lease
5 provides evidence of purchasing a minimum of 23,000 shellfish seed
6 per acre annually and for extensive culture bottom operations, the
7 holder of the lease plants a minimum of 15,000 shellfish seed per acre
8 per year.

9 (2) Water column leases shall be terminated unless:

- 10 a. They produce a minimum of 50 bushels of shellfish per acre averaged
11 over the previous three-year period beginning in year five of the lease;
12 or
13 b. The holder of the lease provides evidence of purchasing a minimum
14 of 23,000 shellfish seed per acre annually.

15 **SECTION 3.(d)** Additional Rule-Making Authority. – The Commission shall adopt
16 a rule to amend the Shellfish Production Requirements Rule consistent with subsection (c) of this
17 section. Notwithstanding G.S. 150B-19(4), the rule adopted by the Commission pursuant to this
18 section shall be substantively identical to the provisions of subsection (c) of this section. Rules
19 adopted pursuant to this section are not subject to Part 3 of Article 2A of Chapter 150B of the
20 General Statutes. Rules adopted pursuant to this section shall become effective as provided in
21 G.S. 150B-21.3(b1), as though 10 or more written objections had been received as provided in
22 G.S. 150B-21.3(b2).

23 **SECTION 3.(e)** Applicability and Sunset. – This section and rules adopted pursuant
24 to this section apply to all new and renewal shellfish leases granted after July 1, 2019. This section
25 expires when permanent rules adopted as required by subsection (d) of this section become
26 effective.

27 28 **STUDY PENALTIES ASSOCIATED WITH VIOLATIONS OF LAWS REGARDING** 29 **TAKING SHELLFISH AND SHELLFISH AQUACULTURE OPERATIONS**

30 **SECTION 4.** The Division of Marine Fisheries of the Department of Environmental
31 Quality, in consultation with the North Carolina Department of Justice and the North Carolina
32 Sentencing and Policy Advisory Commission, shall study the penalties associated with violations
33 of laws regarding taking shellfish and shellfish aquaculture operations. The agencies shall
34 specifically review G.S. 113-207 (Taking shellfish from certain areas forbidden; penalty),
35 G.S. 113-208 (Protection of private shellfish rights), G.S. 113-218 (Protection of private marine
36 aquaculture rights), and G.S. 113-269 (Robbing or injuring hatcheries and other aquaculture
37 operations), and may review other statutes with penalties associated with violations of laws
38 regarding taking shellfish and shellfish aquaculture operations. In their review of the statutes, the
39 agencies shall consider the levels of criminal penalties, fines, and restitution; the consistency and
40 proportionality of the statutes; and whether any of the statutes or their provisions are duplicative.
41 The agencies shall develop recommendations for amendment of the statutes that would make the
42 penalties more consistent and proportional and less duplicative and that would serve to better
43 protect the wild and cultured shellfish resources in the State. The agencies shall report the results
44 of their study, including their recommendations, to the General Assembly no later than March 1,
45 2020.

46 47 **ALLOW TRANSPLANTING OF SEED OYSTERS AND SEED CLAMS FROM** 48 **PERMITTED AQUACULTURE OPERATION NURSERY FACILITIES IN** 49 **PROHIBITED WATERS**

50 **SECTION 5.** G.S. 113-203 reads as rewritten:

51 **"§ 113-203. Transplanting of oysters and clams.**

1 ...
2 (a3) ~~If~~Unless the Secretary determines that the nursery of shellfish in an area will present
3 a risk to public health, it is lawful to transplant seed oysters or seed clams taken from permitted
4 aquaculture operations that use waters in the ~~restricted-prohibited, restricted,~~ or conditionally
5 approved classification to private beds pursuant to an Aquaculture Seed Transplant Permit issued
6 by the Secretary that sets times during which transplant is permissible and other reasonable
7 restrictions imposed by the Secretary under either of the following circumstances:

- 8 (1) When transplanting seed clams less than 12 millimeters in their largest
9 dimension.
10 (2) When transplanting seed oysters less than 25 millimeters in their largest
11 dimension.

12"
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14 **MORATORIUM ON SHELLFISH LEASING IN THE NEW HANOVER COUNTY** 15 **AREA**

16 **SECTION 6.** Notwithstanding G.S. 113-202 and G.S. 113-202.1, a moratorium on
17 new shellfish cultivation leases and new water column leases for aquaculture shall be imposed
18 for all those waters enclosed by a line beginning at 34° 13.10221' N -77° 48.79544' W on the
19 mainland side near Wrightsville Beach Bridge; running southeasterly to a point at 34°12.51584'
20 N -77° 47.81847' W on Wrightsville Beach; following the shoreline southwesterly to a point 34°
21 11.121' N -77° 48.848' W at Masonboro Inlet; running southwesterly to a point 34° 10.927' N -77°
22 48.771' W at Masonboro Inlet; continuing southwesterly along the shoreline near IWW Marker
23 #141 to a point at 34° 07.60069' N -77° 51.03281' W; running westerly to a point 34° 07.77029'
24 N -77° 52.08320' W on the mainland near Peden Point; running northeasterly along the shoreline
25 to the point of beginning. The moratorium shall expire July 1, 2021. For purposes of this section,
26 a new shellfish cultivation lease or water column lease shall include applications for either type
27 of lease received by the Secretary, but not granted as of July 1, 2019.

28 29 **MORATORIUM ON SHELLFISH LEASING IN BOGUE SOUND**

30 **SECTION 7.** Notwithstanding G.S. 113-202 and G.S. 113-202.1, a moratorium on
31 new shellfish cultivation leases and new water column leases for aquaculture shall be imposed
32 for all those waters enclosed by a line beginning at 34° 43.24641' N -76° 41.68436' W; running
33 easterly following the Highway 70 High Rise Bridge to a point at 34° 43.27819' N -76° 41.22259'
34 W; running southerly to a point 34° 42.375275' N -76° 40.80078' W on the southern tip of Radio
35 Island; running southerly to a point 34° 41.98273' N -76° 40.81929' W; following the shoreline
36 westerly to the Emerald Isle Bridge at a point 34° 40.05410' N -77° 03.80531' W; running
37 northwesterly following the bridge to a point 34° 40.77658' N -77° 04.02674' W on the mainland
38 near the Emerald Isle High Rise Bridge; running easterly following the shoreline to the point of
39 beginning. The moratorium shall expire July 1, 2021. For purposes of this section, a new shellfish
40 cultivation lease or water column lease shall include applications for either type of lease received
41 by the Secretary, but not granted as of July 1, 2019.

42 43 **STUDY HOW TO REDUCE USER CONFLICT RELATED TO SHELLFISH** 44 **CULTIVATION LEASES**

45 **SECTION 8.** The Division of Marine Fisheries and the Marine Fisheries
46 Commission shall study how to reduce user conflict related to shellfish cultivation leases. The
47 Division and Commission shall complete this study no later than January 1, 2020, and shall adopt
48 rules and reform internal operating procedures consistent with the findings of the study no later
49 than March 1, 2021.

50 51 **ADMINISTRATIVE REMEDY FOR SHELLFISH LEASING APPEALS**

1 **SECTION 9.1.** G.S. 143B-289.57 is amended by adding a new subsection to read:
2 "(f) The Chair of the Commission shall appoint a three-member Shellfish Cultivation
3 Lease Review Committee to hear appeals of decisions of the Secretary regarding shellfish
4 cultivation leases issued under G.S. 113-202. The Committee shall include one Commission
5 member, who shall serve as the hearing officer, and two public members. One public member
6 shall have expertise or other relevant experience in shellfish aquaculture, and the other public
7 member shall have expertise or other relevant experience with respect to coastal property or
8 property assessment. The Commission shall adopt rules to establish procedures for the appeals
9 and may adopt temporary rules."

10 **SECTION 9.2.** G.S. 113-202(g) reads as rewritten:

11 "(g) After consideration of the public comment received and any additional investigations
12 the Secretary orders to evaluate the comments, the Secretary shall notify the applicant in person
13 or by certified or registered mail of the decision on the lease application. The Secretary shall also
14 notify persons who submitted comments at the public hearing and requested notice of the lease
15 decision. An applicant who is dissatisfied with the Secretary's decision ~~or another person~~
16 ~~aggrieved by the decision~~ may commence a contested case by filing a petition under
17 G.S. 150B-23 within ~~20-30~~ days after receiving notice of the Secretary's decision. In the event
18 the Secretary's decision is a modification to which the applicant agrees, the lease applicant must
19 furnish an amended map or diagram before the lease can be issued by the Secretary. A person
20 other than the applicant who is aggrieved by the Secretary's decision may file a petition for a
21 contested case hearing only if the Shellfish Cultivation Lease Review Committee established
22 pursuant to G.S. 143B-289.57(f) determines that a hearing is appropriate. A request for a
23 determination of the appropriateness of a contested case hearing shall be made in writing and
24 received by the Review Committee within 30 days after the disputed decision is made. A
25 determination of the appropriateness of a contested case shall be made by the Review Committee
26 within 90 days after a request for a determination is received and shall be based on whether the
27 person seeking to commence a contested case:

28 (1) Has alleged that the decision is contrary to a statute or rule.

29 (2) Is directly affected by the decision.

30 (3) Has alleged facts or made legal arguments that demonstrate that the request
31 for the hearing is not frivolous.

32 If the Review Committee determines that a contested case is appropriate, the petition for a
33 contested case shall be filed within 30 days after the Review Committee makes its determination.
34 A determination that a person may not commence a contested case is a final agency decision and
35 is subject to judicial review under Article 4 of Chapter 150B of the General Statutes. If, on
36 judicial review, the court determines that the Review Committee erred in determining that a
37 contested case would not be appropriate, the court shall remand the matter for a contested case
38 hearing under G.S. 150B-23 and final decision on the permit pursuant to G.S. 113A-122.
39 Decisions in such cases shall be rendered pursuant to those rules, regulations, and other
40 applicable laws in effect at the time of the commencement of the contested case.

41 The applicant or another person aggrieved by a final decision under this section may appeal
42 the decision to the superior court of the county where the proposed lease or any part thereof is
43 located, pursuant to the provisions of Chapter 150B of the General Statutes."

44 **SEVERABILITY CLAUSE AND EFFECTIVE DATE**

45 **SECTION 10.1.** If any section or provision of this act is declared unconstitutional
46 or invalid by the courts, it does not affect the validity of this act as a whole or any part other than
47 the part declared to be unconstitutional or invalid.

48 **SECTION 10.2.** Except as otherwise provided, this act becomes effective July 1,
49 2019.
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