

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2019

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SENATE BILL 648

Agriculture/Environment/Natural Resources Committee Substitute Adopted 5/2/19

Short Title: Support Shellfish Aquaculture.

(Public)

Sponsors:

Referred to:

April 4, 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.(a)** 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.(b)** 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.(c)** G.S. 113-202.1 is amended by adding a new subsection to read:

35 "(j) The Secretary may establish Shellfish Aquaculture Enterprise Areas for water column
36 leasing pursuant to this subsection. The Secretary may establish one or more Shellfish



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

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

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

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

31 **INCREASE PRODUCTION AND PLANTING REQUIREMENTS FOR SHELLFISH** 32 **LEASES**

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

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

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

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

- 48 (1) Franchises recognized pursuant to G.S. 113-206 and shellfish bottom leases
49 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 **FACILITATE THE TRANSITION OF TERMINATED LEASES TO PRODUCTIVE** 29 **USES**

30 **SECTION 4.(a)** G.S. 113-202(n) reads as rewritten:

31 "(n) Upon final termination of any leasehold, ~~the bottom in question is thrown open to the~~
32 ~~public for use in accordance with laws and rules governing use of public grounds generally.~~the
33 Secretary may do any of the following:

- 34 (1) Make the bottom available for a new lease application for a period of 18
35 months.
36 (2) Designate the bottom as a Shellfish Aquaculture Enterprise Area.
37 (3) Make the bottom open to the public for use in accordance with laws and rules
38 governing use of public grounds generally.

39 Within 30 days of final termination of the leasehold, the former leaseholder shall remove all
40 abandoned gear and markers denominating the area of the leasehold as a private bottom. The
41 State may, after 10 days' notice to the owner of the abandoned gear and markers thereof, remove
42 the abandoned structure and have the area cleaned up. The cost of such removal and cleanup shall
43 be payable by the owner of the abandoned gear and markers and the State may bring suit to
44 recover the costs thereof."

45 **SECTION 4.(b)** G.S. 113-202(a) reads as rewritten:

46 "(a) To increase the use of suitable areas underlying coastal fishing waters for the
47 production of shellfish, the Secretary may grant shellfish cultivation leases to persons who reside
48 in North Carolina under the terms of this section when the Secretary determines, in accordance
49 with his duty to conserve the marine and estuarine resources of the State, that the public interest
50 will benefit from issuance of the lease. Suitable areas for the production of shellfish shall meet
51 the following minimum standards:

- 1 (1) The area leased must be suitable for the cultivation and harvesting of shellfish
2 in commercial quantities.
- 3 (2) ~~The Except as provided under subsection (n) of this section, the area leased~~
4 must not contain a natural shellfish bed.

5"

6 **SECTION 4.(c)** This section becomes effective July 1, 2019, and applies to leases
7 terminated on or after that date.

8

9 **ALLOW TRANSPLANTING OF SEED OYSTERS AND SEED CLAMS FROM**
10 **PERMITTED AQUACULTURE OPERATION NURSERY FACILITIES IN**
11 **PROHIBITED WATERS**

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

13 "**§ 113-203. Transplanting of oysters and clams.**

14 ...

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

- 21 (1) When transplanting seed clams less than 12 millimeters in their largest
22 dimension.
- 23 (2) When transplanting seed oysters less than 25 millimeters in their largest
24 dimension.

25"

26

27 **ADMINISTRATIVE REMEDY FOR SHELLFISH LEASING APPEALS**

28 **SECTION 6.(a)** G.S. 143B-289.57 is amended by adding a new subsection to read:

29 "**(f)** The Chair of the Commission shall appoint a three-member Shellfish Cultivation
30 Lease Review Committee to hear appeals of decisions of the Secretary regarding shellfish
31 cultivation leases issued under G.S. 113-202. The Committee shall include one Commission
32 member, who shall serve as the hearing officer, and two public members. One public member
33 shall have expertise or other relevant experience in shellfish aquaculture, and the other public
34 member shall have expertise or other relevant experience with respect to coastal property or
35 property assessment. The Commission shall adopt rules to establish procedures for the appeals
36 and may adopt temporary rules."

37 **SECTION 6.(b)** G.S. 113-202(g) reads as rewritten:

38 "(g) After consideration of the public comment received and any additional investigations
39 the Secretary orders to evaluate the comments, the Secretary shall notify the applicant in person
40 or by certified or registered mail of the decision on the lease application. The Secretary shall also
41 notify persons who submitted comments at the public hearing and requested notice of the lease
42 decision. An applicant who is dissatisfied with the Secretary's decision ~~or another person~~
43 ~~aggrieved by the decision~~ may commence a contested case by filing a petition under
44 G.S. 150B-23 within ~~20-30~~ days after receiving notice of the Secretary's decision. In the event
45 the Secretary's decision is a modification to which the applicant agrees, the lease applicant must
46 furnish an amended map or diagram before the lease can be issued by the Secretary. A person
47 other than the applicant who is aggrieved by the Secretary's decision may file a petition for a
48 contested case hearing only if the Shellfish Cultivation Lease Review Committee established
49 pursuant to G.S. 143B-289.57(f) determines that a hearing is appropriate. A request for a
50 determination of the appropriateness of a contested case hearing shall be made in writing and
51 received by the Review Committee within 30 days after the disputed decision is made. A

determination of the appropriateness of a contested case shall be made by the Review Committee within 90 days after a request for a determination is received and shall be based on whether the person seeking to commence a contested case:

- (1) Has alleged that the decision is contrary to a statute or rule.
- (2) Is directly affected by the decision.
- (3) Has alleged facts or made legal arguments that demonstrate that the request for the hearing is not frivolous.

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

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

SECTION 6.(c) This section becomes effective July 1, 2019, and applies to decisions of the Secretary made on or after that date.

MORATORIUM ON SHELLFISH LEASING IN THE NEW HANOVER COUNTY AREA

SECTION 7. Notwithstanding G.S. 113-202 and G.S. 113-202.1, a moratorium on new shellfish cultivation leases and new water column leases for aquaculture shall be imposed for all those waters enclosed by a line beginning at 34° 13.10221' N -77° 48.79544' W on the mainland side near Wrightsville Beach Bridge; running southeasterly to a point at 34° 12.51584' N -77° 47.81847' W on Wrightsville Beach; following the shoreline southwesterly to a point at 34° 11.121' N -77° 48.848' W at Masonboro Inlet; running southwesterly to a point at 34° 10.927' N -77° 48.771' W at Masonboro Inlet; continuing southwesterly to a point at 34° 05.04108' N -77° 52.08324' W near IWW marker #159 continuing running southwesterly to a point at 34° 03.64140' N -77° 53.41338' W on the mainland adjacent to the eastern mouth of Snow's Cut; running northeasterly along the shoreline to the point of beginning. The moratorium shall expire July 1, 2021. For purposes of this section, a new shellfish cultivation lease or water column lease shall include applications for either type of lease received by the Secretary, but not granted as of July 1, 2019.

MORATORIUM ON SHELLFISH LEASING IN BOGUE SOUND

SECTION 8. Notwithstanding G.S. 113-202 and G.S. 113-202.1, a moratorium on new shellfish cultivation leases and new water column leases for aquaculture shall be imposed for all those waters enclosed by a line beginning at 34° 43.24641' N -76° 41.68436' W; running easterly following the Highway 70 High Rise Bridge to a point at 34° 43.27819' N -76° 41.22259' W; running southerly to a point 34° 42.375275' N -76° 40.80078' W on the southern tip of Radio Island; running southerly to a point 34° 41.98273' N -76° 40.81929' W; following the shoreline westerly to the Emerald Isle Bridge at a point 34° 40.05410' N -77° 03.80531' W; running northwesterly following the bridge to a point 34° 40.77658' N -77° 04.02674' W on the mainland near the Emerald Isle High Rise Bridge; running easterly following the shoreline to the point of beginning. The moratorium shall expire July 1, 2021. For purposes of this section, a new shellfish cultivation lease or water column lease shall include applications for either type of lease received by the Secretary, but not granted as of July 1, 2019.

1
2 **STUDY HOW TO REDUCE USER CONFLICT RELATED TO SHELLFISH**
3 **CULTIVATION LEASES**

4 **SECTION 9.** The Division of Marine Fisheries and the Marine Fisheries
5 Commission shall study how to reduce user conflict related to shellfish cultivation leases. The
6 Division and Commission shall complete this study no later than January 1, 2020, and shall adopt
7 rules and reform internal operating procedures consistent with the findings of the study no later
8 than March 1, 2021.

9
10 **STUDY PENALTIES ASSOCIATED WITH VIOLATIONS OF LAWS REGARDING**
11 **TAKING SHELLFISH AND SHELLFISH AQUACULTURE OPERATIONS**

12 **SECTION 10.** The Division of Marine Fisheries of the Department of Environmental
13 Quality, in consultation with the North Carolina Department of Justice and the North Carolina
14 Sentencing and Policy Advisory Commission, shall study the penalties associated with violations
15 of laws regarding taking shellfish and shellfish aquaculture operations. The agencies shall
16 specifically review G.S. 113-207 (Taking shellfish from certain areas forbidden; penalty),
17 G.S. 113-208 (Protection of private shellfish rights), G.S. 113-218 (Protection of private marine
18 aquaculture rights), and G.S. 113-269 (Robbing or injuring hatcheries and other aquaculture
19 operations), and may review other statutes with penalties associated with violations of laws
20 regarding taking shellfish and shellfish aquaculture operations. In their review of the statutes, the
21 agencies shall consider the levels of criminal penalties, fines, and restitution; the consistency and
22 proportionality of the statutes; and whether any of the statutes or their provisions are duplicative.
23 The agencies shall develop recommendations for amendment of the statutes that would make the
24 penalties more consistent and proportional and less duplicative and that would serve to better
25 protect the wild and cultured shellfish resources in the State. The agencies shall report the results
26 of their study, including their recommendations, to the General Assembly no later than March 1,
27 2020.

28
29 **STUDY OF SHELLFISH LOAN PROGRAM**

30 **SECTION 11.** The North Carolina Coastal Federation (Federation) shall study a
31 low-interest loan program to provide start-up and expansion capital to shellfish growers in waters
32 of the State. As part of its study, the Federation shall investigate and recommend optimal loan
33 terms, a recommended administrative structure for the program, and limitations on loan amounts
34 and on uses of loaned funds necessary to maximize public economic benefits and target funding
35 support where need is greatest. The Federation may use administrative funds provided to it under
36 S.L. 2018-5 for the study. The Federation shall submit its report, including funding needs and
37 any legislative proposals, to the Joint Legislative Oversight Committee on Agriculture and
38 Natural and Economic Resources and the Fiscal Research Division no later than March 15, 2020.

39
40 **STUDY CROP INSURANCE FOR SHELLFISH AQUACULTURE**

41 **SECTION 12.** The Department of Agriculture and Consumer Services shall study
42 crop insurance and other risk of loss mitigation and protection programs available to persons
43 engaging in shellfish aquaculture in North Carolina. The Department shall include all of the
44 following in its study:

- 45 (1) An overview and assessment of currently available State or federal programs,
46 including programs offered in other states, and identification of gaps or
47 shortfalls in the coverage provided by those programs.
- 48 (2) The identification of options for insurance or other risk protection programs
49 subsidized or underwritten by the State, including an analysis of feasibility,
50 cost, and whether the option would provide sufficient spread of risk to be an
51 actuarially sound investment of public funds.

1 (3) If the Department finds that no program limited to this State is actuarially
2 sound, an assessment of legal, practical, or political barriers to a federal or
3 multistate crop insurance or other risk mitigation program for shellfish
4 aquaculture.

5 The Department shall submit its report, including recommendations for required
6 funding and any legislative changes needed, to the Joint Legislative Oversight Committee on
7 Agriculture and Natural and Economic Resources and the Fiscal Research Division no later than
8 November 1, 2020.

9
10 **SEVERABILITY CLAUSE AND EFFECTIVE DATE**

11 **SECTION 13.(a)** If any section or provision of this act is declared unconstitutional
12 or invalid by the courts, it does not affect the validity of this act as a whole or any part other than
13 the part declared to be unconstitutional or invalid.

14 **SECTION 13.(b)** Except as otherwise provided, this act becomes effective July 1,
15 2019.