

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2019

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SENATE BILL 648

Short Title: Support Shellfish Aquaculture. (Public)

Sponsors: Senators Sanderson and Rabon (Primary Sponsors).

Referred to: Rules and Operations of the Senate

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 1.1.** 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:

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 1.4.** 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 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 40 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 45,000 shellfish seed
6 per acre annually and for extensive culture bottom operations, the
7 holder of the lease plants a minimum of 30,000 shellfish seed per acre
8 per year.

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

- 10 a. They produce a minimum of 100 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 45,000 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 "

13

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. For purposes of this section, a new shellfish cultivation lease or water

26 column lease shall include applications for either type of lease received by the Secretary, but not

27 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 follow 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. For purposes of this section, a new shellfish cultivation lease or water column lease

40 shall include applications for either type of lease received by the Secretary, but not granted as of

41 July 1, 2019.

42

43 **ADMINISTRATIVE REMEDY FOR SHELLFISH LEASING APPEALS**

44 **SECTION 8.1.** G.S. 143B-289.57 is amended by adding a new subsection to read:

45 "(f) The Chair of the Commission shall appoint a three-member Shellfish Cultivation

46 Lease Review Committee to hear appeals of decisions of the Secretary regarding shellfish

47 cultivation leases issued under G.S. 113-202. The Committee shall include one Commission

48 member, who shall serve as the hearing officer, and two public members. One public member

49 shall have expertise or other relevant experience in shellfish aquaculture, and the other public

50 member shall have expertise or other relevant experience with respect to coastal property or

1 property assessment. The Commission shall adopt rules to establish procedures for the appeals
2 and may adopt temporary rules."

3 **SECTION 8.2.** G.S. 113-202(g) reads as rewritten:

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

21 (1) Has alleged that the decision is contrary to a statute or rule;

22 (2) Is directly affected by the decision; and

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

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

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

37 38 **SEVERABILITY CLAUSE AND EFFECTIVE DATE**

39 **SECTION 9.1.** If any section or provision of this act is declared unconstitutional or
40 invalid by the courts, it does not affect the validity of this act as a whole or any part other than
41 the part declared to be unconstitutional or invalid.

42 **SECTION 9.2.** Except as otherwise provided, this act becomes effective July 1,
43 2019.