

Alabama Adopts New Shellfish Aquaculture Rule to Promote Development of Off-Bottom Oyster Aquaculture Industry

The Gulf of Mexico oyster industry has suffered a number of setbacks in recent years, both natural and manmade. These setbacks include such things as changing salinity levels as a result of riverine flooding, pollution impacts from the Deepwater Horizon oil spill, and closed harvest areas caused by water pollution and food safety concerns. For an industry built around inexpensive, plentiful oysters, these developments present significant challenges. Off-bottom oyster farming for the high-value, half-shell niche market, as practiced on the northeast and Pacific coasts, provides an opportunity for Gulf residents to create jobs, increase profits and diversify the oyster industry. One obstacle to the successful development of this new industry in Alabama was the lack of clear regulatory guidance for permitting off-bottom aquaculture activities in coastal waters.

Need for Clear Permitting Fee Structure

Prior to 2013, there was no explicit rule addressing shellfish aquaculture in Alabama. Under Alabama law, the owners of land fronting on rivers, bayous, lagoons, lakes, bays, sounds and inlets where oysters may be grown have riparian rights to plant and gather oysters in the waters in front of their land. However, these riparian rights are still subject to state oversight and permitting, including state leasing of submerged waterbottoms.

Until recently, the only regulations for leasing submerged lands related to marinas and docks. Although the Alabama Department of Conservation and Natural Resources (DCNR) regulation was developed to govern marina development, it did contain a catch-all leasing provision for any revenue generation/income related activities. (ALA. ADMIN. CODE r. 220-4-.09). Leases issued by the state under this provision are referred to as riparian easements.



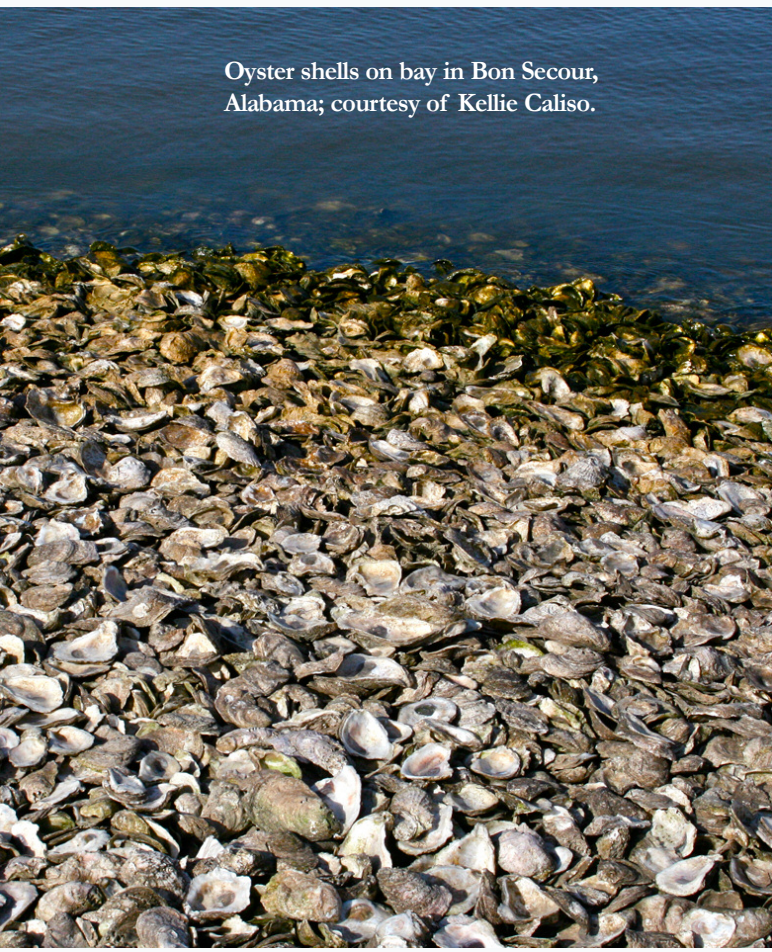
The fee for riparian easements under that section is a base fee of 12.5 cents per square foot of riparian easement area per year with a minimum annual fee of \$500. Under this fee structure, a riparian easement would cost around \$6,000 per acre. These fees were much higher than those in nearby states, like Louisiana where oyster leasing fees are approximately \$2.00 per acre.

Auburn University researcher Bill Walton received funding from the Mississippi-Alabama Sea Grant Consortium to implement a research project focused on testing various gear types for use by the oyster aquaculture community. To further the development of this emerging business, the project called for the creation of an oyster aquaculture park where different growers could lease out space and use a range of gear structures. This would allow those entering the market to test out different systems to determine what worked best for their individual needs. Ultimately, the aquaculture park would create a business incubator for the fledgling Alabama oyster aquaculture industry, providing smaller scale market entry for new businesses. However, as the project advanced, the unusual permitting structure in Alabama that resulted in higher fees became a challenge to getting the park up and running.

To assist with this transition of off-bottom culture from experimental research project to private industry, the Mississippi-Alabama Sea Grant Legal Program drafted three legal memorandums that outlined the legal framework for off-bottom oyster culture in Alabama, including the authorities of key permitting agencies and permit requirements for leasing submerged lands. These memorandums were shared by the scientists with states agencies and potential growers, raising awareness of the permitting process and legal barriers and eventually contributing to the formation of a state legislative study committee.

Shellfish Aquaculture Review Board

In May 2013, the Alabama Legislature created a seven-member Shellfish Aquaculture Review Board with the purpose of “developing a shellfish aquaculture policy and implementing a sustainable program for leasing land in the coastal waters of Alabama for oyster aquaculture.” (ALA. CODE § 9-2-150(b)). The Board was tasked with recommending to the Alabama Department of Conservation and Natural Resources (DCNR) rules that would create a program for leasing of submerged lands for oyster aquaculture. Guidelines for the program included not adversely impacting wild stocks or fish or infringing on oyster riparian rights of riparian owners. (ALA. CODE § 9-2-150).



Oyster shells on bay in Bon Secour, Alabama; courtesy of Kellie Caliso.

Further, the Legislature directed the Board that leasing must consider conflicts with traditional uses of coastal waters (navigation, commercial fishing and recreation) and prohibit the propagation of nonnative species. The Board was finally directed that fees should be such that they encourage the economic viability of oyster aquaculture. (ALA. CODE § 9-2-151).

The Board held three meetings where federal and state agencies were consulted. There was input by the Public Health Department, the State Lands Division, the Department of Environmental Management, the U.S. Army Corps of Engineers and the U.S. Coast Guard. Major topics discussed included submerged aquatic vegetation, the Corps' Nationwide Permit 48 (for shellfish aquaculture), and marking and lighting requirements of the Coast Guard.

New Rule Adopted: Shellfish Aquaculture Easements

The efforts of the Review Board resulted in the Alabama Department of Conservation and Natural Resources (DCNR) proposing a new shellfish aquaculture rule in February 2014 to provide for the granting of easements of state owned submerged lands to encourage off-bottom oyster aquaculture. The rule was adopted on April 7, 2014.

Under the new rule, shellfish aquaculture is defined as off-bottom cultivation and harvesting for commercial or research purposes. The new rule provides for two types of shellfish aquaculture easements: riparian and non-riparian. Riparian shellfish aquaculture easements require that the easement holder have upland property interest, and activities in the easement area must be setback 10 feet from neighboring riparian owners so as to avoid any conflicts between users. Non-riparian shellfish aquaculture easements cannot be granted until DCNR determines that the easement will not impair other riparian rights. Non-riparian easements are also limited in size to a maximum of five acres. (ALA. ADMIN. CODE r. 220-4-.17).

Only species native to Alabama may be grown on shellfish aquaculture easement. To protect navigation, aquaculture easements must be 100 feet from navigation channels and sufficiently marked. The maximum term of a shellfish easement is five years, with a right to renew for another five years.

The lease is restricted to use of the state-owned water bottoms and the water column as well as activities associated with related on-shore facilities. Docks for purposes immediately associated with shellfish aquaculture activities can be constructed, but docks only incidentally related (or primarily used for other purposes) are not permitted under this provision. All dock construction must comply with Alabama regulations (ALA. ADMIN. CODE r. 220-4-.09). However, the shellfish aquaculture docks are exempt from the fees associated with general dock construction.

The costs of the easements are annual and are calculated based on a fixed rate determined by DCNR (or by competitive bidding under certain circumstances). Annual fee minimums are not to be less than \$250 per acre, although public agencies and institutions may be exempt. Finally, DCNR requires that a shellfish aquaculture easement applicant obtain all other necessary permits and approvals from federal, state and local agencies before DCNR will approve the commencement of aquaculture activities on the easement area. This notification is referred to as written Notice to Proceed.

Conclusion

In Alabama, the legislation passed in 2013 that led to the adoption of the new fee structure for leasing state-owned water bottoms for shellfish aquaculture reduced initial permitting confusion and out-of-pocket expenses by more than \$5,000. Through this program, researchers at Auburn University created a shellfish aquaculture park to serve as business incubator for new oyster aquaculture development in Alabama waters. There are now seven commercial oyster farms in Alabama, including Murder Point Oysters which began in the oyster aquaculture park established under this research project.

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