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Shellfish Production in Virginia: Private Leasing Grounds



Photo Courtesy of Virginia Sea Grant

Nathan Burchard, J.D. 2019
Virginia Coastal Policy Center
William & Mary Law School



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About the Author



Nathan Burchard is a recent graduate of William & Mary Law School. While in law school, Nathan worked on the William & Mary Bill of Rights Journal staff, was a Student Advocate with the PELE Special Education Clinic, and participated in the Virginia Coastal Policy Center's Practicum I during the spring 2019 semester. He also interned with Ayuda, in Falls Church, Virginia, and with the Arlington Immigration Court. He graduated from The University of Texas at Austin in 2015 with a B.A. in Plan II Honors and International Relations, and then served with AmeriCorps for a year in Austin, Texas. In September 2019 Nathan will join Catholic Charities' Cabrini Center for Immigrant Legal Assistance as a Staff Attorney representing unaccompanied immigrant children in his hometown of Houston, Texas.

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About the Virginia Coastal Policy Center

The Virginia Coastal Policy Center (VCPC) at the College of William & Mary Law School provides science-based legal and policy analysis of ecological issues affecting the state's coastal resources, by offering education and advice to a host of Virginia's decision-makers, from government officials and legal scholars to non-profit and business leaders.

With two nationally prominent science partners – the Virginia Institute of Marine Science and Virginia Sea Grant – VCPC works with scientists, local and state political figures, community leaders, the military, and others to integrate the latest science with legal and policy analysis to solve coastal resource management issues. VCPC activities are inherently interdisciplinary, drawing on scientific, economic, public policy, sociological, and other expertise from within the University and across the country. With access to internationally recognized scientists at VIMS, to Sea Grant's national network of legal and science scholars, and to elected and appointed officials across the nation, VCPC engages in a host of information exchanges and collaborative partnerships.

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questions, or suggestions.

VCPC grounds its pedagogical goals in the law school's philosophy of the citizen lawyer. VCPC students' highly diverse interactions beyond the borders of the legal community provide the framework for their efforts in solving the complex coastal resource management issues that currently face Virginia and the nation.

I. INTRODUCTION

People have harvested oysters in Virginia's Tidewater region for thousands of years, however the emergence and accelerated growth of aquaculture in the twenty-first century has led to friction and growing pains as industry practices brush up against sometimes outdated laws and policies.¹

Article XI of Virginia's Constitution requires the Commonwealth to protect its natural resources and public lands for Virginians' use and benefit.² The Virginia courts' interpretation of this concept is known as the common law public trust doctrine.³ The Commonwealth retains ownership of "[a]ll the beds of the bays, rivers, creeks and the shores of the sea" within its jurisdiction.⁴ For purposes of shellfish production in Virginia, there is both a public fishery and a private leasing system in place. The portion of the state-owned bottomlands within the public fishery are called the Baylor Grounds.⁵ The remaining state-owned bottomlands not set aside for another purpose – such as for the public fishery or for purposes of navigational projects – are available for lease by certain private entities "for the purpose of planting or propagating oysters[.]"⁶ Potential leaseholders must submit proper applications to the Virginia Marine Resources Commission (VMRC), which possesses the authority to grant leases to use the designated plats of bottomland.⁷

Naturally, because Virginians use the waters and bottomlands in a variety of ways, competing interests can cause conflicts to arise. Multiple efforts to explore potential solutions to

¹ Mollie Bloudoff-Indelicato, *Native Americans Harvested Oyster Responsibly. Why Can't We?*, NAT'L GEOGRAPHIC (June 10, 2016), www.nationalgeographic.com/people-and-culture/food/the-plate/2016/06/sustainable-oyster-harvest-chesapeake-bay/.

² VA. CONST. art. XI, §§1-2. "To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources [and] its public lands. . . Further, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth." Section 2 of Article XI authorizes the Commonwealth to undertake conservation and development efforts through creating statutes and government agencies to fulfill the purpose of Section 1.

³ VA. CODE ANN. § 28.2-1205(A) (2005); *see, e.g.*, *Palmer v. Commonwealth Marine Res. Comm'n*, 628 S.E. 2d 84, 89 (Va. Ct. App. 2006) ("The state holds the land lying beneath public waters as trustee for the benefit of all citizens. As trustee, the state is responsible for proper management of the resource to ensure the preservation and protection of all appropriate current and potential future uses, including potentially conflicting uses, by the public."). *See also* Sharon M. Kelly, *The Public Trust and the Constitution: Routes to Judicial Overview of Resource Management Decisions in Virginia*, 75 VA. L. REV. 895, 896 (1989) (noting that the public trust doctrine provides that "tidelands and certain other lands and waters are held by the state in trust for its citizens, to be used only for the benefit of the public").

⁴ VA. CODE ANN. § 28.2-1200 (1998).

⁵ This white paper was developed in conjunction with a second white paper, *Shellfish Production in Virginia: The Baylor Grounds*, which further describes the Baylor Grounds and their use. That paper is available on the Virginia Coastal Policy Center's reports page at <https://law.wm.edu/academics/programs/jd/electives/clinics/vacoastal/reports/index.php>.

⁶ VA. CODE ANN. § 28.2-603 (2011).

⁷ *Id.*

conflicts related to aquaculture operations have been spearheaded by groups such as the Lynnhaven River Shellfish Workgroup and the York River Use Conflict Committee. These groups have held a variety of meetings centered around the goals of identifying “user conflicts associated with the commercial use of leased oyster ground and the concerns of highland property owners”⁸ and to provide local governments with “policy recommendations ... to address the[se] conflicts”.⁹ For example, in 2016, the Lynnhaven River Shellfish Workgroup voted to support the implementation of changes to the lease application notification requirements to “improve[e] the adjacent property owner notification process” which should help to alleviate conflicts between lease owners and their surrounding communities.¹⁰

More recently, in 2018, the Office of the Secretary of Natural Resources gathered a Clam and Oyster Aquaculture Work Group (the “SNR Work Group”) comprised of interested parties.¹¹ Members of the SNR Work Group represented the shellfish industry, local governments, waterfront property owners, non-profit conservation organizations, and the Virginia General Assembly.¹² Among the SNR Work Group’s conclusions, the stakeholders agreed that (1) the purpose of oyster aquaculture leases is productivity and beneficial use and (2) VMRC should be able to ensure that the leases fulfill that purpose.¹³ In recognition of private leasing grounds’ productive purpose and the public trust doctrine, the SNR Work Group’s report agreed and affirmed that public grounds leased for non-beneficial use conflict with the public trust doctrine and VMRC’s duty to uphold it. Often, these private leasing grounds are left intentionally fallow or unproductive to prevent aquaculture operations for navigational and aesthetic purposes.¹⁴ Such leases are referred to in the report as “bad faith leases,” “spite leases,” or as being leased by “bad actors” for “nefarious” or “non-beneficial use” purposes.¹⁵ For the purposes of this paper, public grounds leased with the intent that they remain empty or minimally productive will be called “obstructive leases.” The SNR Work Group’s report also identified areas for new policy solutions to uphold the leases’ productive purpose, which include use plans, beneficial use requirements, leasing procedures and practices, subaqueous vegetation conservation, and VMRC’s enforcement capabilities.¹⁶ To carry out the Commonwealth’s public trust doctrine and ensure that the submerged bottomlands are used for the benefit of the people of Virginia, the SNR Work Group’s

⁸ *Lynnhaven River Shellfish Work Group*, Report of Recommendations from the Lynnhaven River Shellfish Work Group (Aug. 15, 2016), <https://mrc.virginia.gov/SMAC/2016-08-15-Lynnhaven-River-Oyster-Workgroup-recommendations-final-report.pdf>.

⁹ Elizabeth Andrews, *Managing Use Conflicts on the Lynnhaven River*, VA. COASTAL POL’Y CTR., WM. & MARY L. SCH. 7 (2018), <http://nsglc.olemiss.edu/projects/shellfish-aquaculture/files/lynnhavenriver.pdf>.

¹⁰ *Id.* at 6. This recommendation was in fact implemented and is now codified in VA. CODE ANN. § 28.2-606 (A) (2017).

¹¹ CLAM AND OYSTER AQUACULTURE WORK GROUP, VA. OFF. OF THE SEC’Y OF NAT. RES., REPORT OF THE WORK GROUP’S DELIBERATIONS AND RECOMMENDATIONS TO ADDRESS AQUACULTURE USE CONFLICTS (2018), <https://www.naturalresources.virginia.gov/media/governorviriniagov/secretary-of-natural-resources/pdf/Clam-and-Oyster-Aquaculture-Work-Group---FINAL-REPORT.pdf> [hereinafter Aquaculture Work Group Report].

¹² *Id.* at 1-2.

¹³ *Id.* at 7.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 6-17.

report also suggested exploring the legal requirements and ramifications pertaining to “Proof of Use” and opportunities to make leasing policy more enforceable.

During its 2019 session, the Virginia General Assembly passed numerous pieces of legislation related to the private leasing grounds program. In addition to increasing lease application and transfer fees and requiring that VMRC establish a fee structure for lease renewals, the new legislation also expanded the factors for VMRC to consider when approving, renewing, or transferring a lease.¹⁷ In spring 2019, VMRC formed the Aquaculture Management Advisory Committee (AMAC), which will provide ongoing management advisory assistance to VMRC staff and continue to address shellfish management issues addressed by the SNR Work Group.¹⁸ AMAC is comprised of industry, nonprofit, and academic representatives from throughout Virginia’s coastal region and chaired by Ellen Bolen, VMRC’s Deputy Commissioner.¹⁹ Current efforts of AMAC include lease renewal fee setting and determining an appropriate interpretation of beneficial use that will adequately reflect the goals of current legislation and the various parties involved.²⁰

This paper will focus on the private leasing grounds program to summarize the existing framework for use plans and beneficial use criteria in Virginia, provide examples of how other states utilize use plans and use criteria, and briefly touch on additional considerations such as fee structures and lease terms. For each of these items, this paper will identify potential changes that could be made to Virginia’s program in order to increase shellfish production.

II. USE PLANS

Currently, new applications and transfer applications for oyster planting grounds require the applicant to provide some detail regarding their planned use of the grounds.²¹ However, detailed use plans are not required unless the leaseholder requires additional permits for structures that extend greater than twelve inches above the bottom.²² At the time of initial application, VMRC learns only (1) the lease location and lease acreage, (2) whether the grounds will be used for traditional shelling of the bottom or to cultivate existing shell resources, (3) whether the leaseholder plans to plant spat and/or seed oysters on the bottom, (4) whether the leaseholder plans to install structures on-bottom for shellfish production, (5) whether such on-bottom structures will

¹⁷ See VA. CODE ANN. §§ 28.2-607, -608, -613, -625 (2019).

¹⁸ *Agency News*, VA. MARINE RES. COMM’N (Apr. 8, 2019), <http://www.mrc.virginia.gov/whatsnew.shtm> (last accessed July 15, 2019).

¹⁹ *Aquaculture Management Advisory Committee*, VA. MARINE RES. COMM’N, <https://www.mrc.virginia.gov/AMAC/amac.shtm> (last accessed July 15, 2019).

²⁰ Audio Recording: Aquaculture Management Advisory Committee June Meeting (June 10, 2019), <https://www.mrc.virginia.gov/AMAC/2019/AMAC-2019-06-10.mp3>.

²¹ *Application for Oyster Planting Ground*, VA. MARINE RES. COMM’N (Mar. 4, 2019), http://www.mrc.virginia.gov/forms/2019/OGLS/OYSTERGROUND_APPLICATION-03-04-2019.pdf; *Application for Transfer of Oyster Planting Ground*, VA. MARINE RES. COMM’N (Mar. 21, 2019), <http://www.mrc.virginia.gov/forms/2019/OGLS/OYSTERGROUNDTRANSFERrevised-03-04-2019.pdf>. (Note that these forms have been updated since the publication of this white paper. Current forms can be found on the VMRC website: <https://www.mrc.virginia.gov/Forms/index.shtm>.)

²² *Id.*; 4 VA. ADMIN. CODE § 20-335-10 (2010).

exceed a height of 12 inches, (6) whether the leaseholder will use traditional clam cultivation methods on the bottom, and (7) whether other uses, not included elsewhere in the document, are proposed.²³ And at the time of transfer, the current leaseholder must provide information regarding use of the grounds since the most recent assignment or renewal, including (1) whether the grounds were used for traditional shelling or to cultivate existing shell resources, (2) whether there was any planting of spat and/or seed oysters, (3) whether any traditional clam cultivation methods were used, and (4) whether the grounds were used for any other purpose.²⁴ Additionally, the party requesting the transfer must answer (1) whether the grounds will be used for traditional harvest or planting, (2) whether on-bottom structures not to exceed 12 inches will be used, and (3) whether the grounds will be used for any other purpose.²⁵ These basic use questions provide little detail regarding a leaseholder's planned operations over the course of their ten-year lease.

Other states with shellfish aquaculture lease programs require more in-depth information from applicants. For example, Maine's application requests detail on the name of species to be cultivated, name and address of source of seed stock, and maximum number of organisms on the site at any given time.²⁶ On this same application, if an applicant is using gear for growout, they must submit gear drawings and maximum structure schematics, gear information, and equipment layout.²⁷ Additionally, the application includes an open-ended section regarding "production activities" which requests information related to the applicant's seeding, tending, site visits, and harvest techniques.²⁸ Similarly, at the time of application, Rhode Island requires submission of an "operations plan" which "is a detailed written description for the aquaculture operation which must include, at minimum, the following information: source(s) of shellfish seed, specifications of proposed hatchery, nursery, seeding and harvesting methods, general gear maintenance techniques (i.e., fouling organism removal methods), proposed operation timetable with respect to actual site work, intended recipient(s) of aquaculture product(s), etc."²⁹ This operations plan is referenced within the actual lease agreement and is enforceable.³⁰

If VMRC intended to deter unproductive use of oyster leases by requiring more detailed information regarding the planned use of the leased grounds at the time of initial application or transfer, amendments to the existing application forms would be needed to gather these details. Additionally, to show that the information is binding, it should be incorporated into any associated lease agreement. If this is done, the lease agreement also should include language necessary to excuse leaseholders from these obligations in certain circumstances, such as acts of God. However,

²³ *Application for Oyster Planting Ground*, *supra* note 21.

²⁴ *Application for Transfer of Oyster Planting Ground*, *supra* note 21.

²⁵ *Id.*

²⁶ *Aquaculture Lease Application Section E*, ME. DEP'T OF MARINE RES. (Mar. 29, 2019), <https://www.maine.gov/dmr/aquaculture/forms/documents/standardapplication-nondischarge-03.26.19.pdf>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *CRMC Aquaculture Preliminary Determination Request Form*, ST. OF R.I., COASTAL RES. MGMT. COUNCIL 11 (Jan. 2017), <http://www.crmc.ri.gov/applicationforms/AquaApp.pdf>.

³⁰ Email from David Beutel, Aquaculture Coordinator, Coastal Resources Management Council, to Angela King, Assistant Director, Virginia Coastal Policy Center (June 27, 2019 10:49 EST) (on file with author).

consideration should be given to whether or not a more complicated application could potentially hinder entrepreneurship and new aquaculture operations with high-production intent.

III. BENEFICIAL USE CRITERIA

The SNR Work Group identified the concept of “beneficial use” as central to a number of leasing matters, such as lease renewals and transfers.³¹ And, as VMRC’s AMAC has discussed, there are several ways to determine whether an aquaculture lease is being used in a beneficial manner. Potential factors in making this determination could be the amount of planting that is done, the amount of shellfish being harvested, or whether the grounds are used for purposes other than harvesting of shellfish – such as crop rotation, educational, or training purposes.³²

VMRC has the authority, set forth in the Virginia Code, to deny a leaseholder’s application for renewal when “there has been no significant production of oysters or clams, no reasonable plantings of oysters, clams or cultch or no significant oyster or clam aquaculture operation, during any portion of the 10-year period immediately prior to the application for renewal. . . .”³³ In the past, exceptions to the prior productivity requirement have been allowed when leaseholders could show “good cause.”³⁴ Prior to the new 2019 legislation, when determining such good cause for insignificant production, VMRC could consider the prevalence of oyster diseases MSX and Dermo³⁵ and whether adjacent leases had a history of commercial levels of productivity.³⁶ Under the new statutory language, VMRC “shall decide whether the renewal is in the public interest” by considering not only the prevalence of disease and the history of commercial production, but also the public benefits and impacts of shellfish aquaculture and certain factors listed within Virginia Code § 28.2-1205:

- Other reasonable and permissible uses of state waters and state-owned bottomlands;
- Marine and fisheries resources of the Commonwealth;
- Tidal wetlands;
- Adjacent or nearby properties;
- Water quality; and

³¹ Aquaculture Work Group Report, *supra* note 11, at 8.

³² Audio Recording: Aquaculture Management Advisory Committee April Meeting (Apr. 8, 2019), <https://www.mrc.virginia.gov/AMAC/2019/AMAC-2019-04-08.mp3>.

³³ *Id.*; VA. CODE ANN. § 28.2-613 (2019).

³⁴ VA. CODE ANN. § 28.2-613.

³⁵ *Oyster Diseases of the Chesapeake Bay – Dermo and MSX Fact Sheet*, VA. INST. MARINE SCI., <https://www.vims.edu/docs/oysters/oyster-diseases-CB.pdf> (last accessed July 15, 2019). First documented in 1957, MSX is a parasitic disease that infects and kills oysters during the warmer summer months, especially in waters with higher salinity. *Id.* MSX spread and decimated oyster populations from Florida to Maine throughout the end of the twentieth century. *Id.* In similar fashion, Dermo, another parasitic disease, kills oysters in warmer waters at higher salinities where parasites proliferate and hundreds of thousands overwhelm an oyster’s internal tissues, usually during their second year. *Id.* Recently, MSX’s decline, a return to more normal salinity levels, and oysters’ growing resistance to both Dermo and MSX have led to a rebound in the health of East Coast oyster populations. Timothy B. Wheeler, *Oysters starting to show signs of resistance to Dermo, MSX*, BAY JOURNAL (Dec. 26, 2017), bayjournal.com/article/oysters-starting-to-show-signs-of-resistance-to-dermo-msx.

³⁶ Compare VA. CODE ANN. § 28.2-613 (1997) with VA. CODE ANN. § 28.2-613 (2019).

- Submerged aquatic vegetation (SAV).³⁷

Similarly, the new statutory language in Virginia Code § 28.2-625 states that VMRC must consider whether transfers are in the public interest in accordance with the factors provided in Virginia Code § 28.2-1205, listed above, as well as the public benefits and impacts of shellfish aquaculture.³⁸ This new language in §§ 28.2-613 and 28.2-625 suggests that (1) the Commissioner has expanded discretion and authority regarding the renewal and transfer of leases, and (2) leaseholders may face more difficulty justifying their plat’s lack of productivity. This conclusion is supported by the SNR Work Group’s consensus that VMRC “should be given certain latitude to exercise discretion—‘to use common sense’ as many put it—on matters regarding leasing.”³⁹

Multiple factors listed in newly revised §§ 28.2-613 and 28.2-625 could support VMRC enforcing higher productivity requirements more strictly. First, oysters can benefit water quality.⁴⁰ Because each oyster can filter more than fifty gallons of water per day, more intensive aquaculture could remove even more phytoplankton and excessive nutrients from the Commonwealth’s water, thus benefitting water quality.⁴¹ Second, aquaculture also can benefit the marine and fisheries resources of the Commonwealth.⁴² Shellfish are a more sustainable marine food source than other finfish fisheries.⁴³ Therefore, VMRC could also consider the “marine and fisheries resources of the Commonwealth” factor in favor of justifying decisions supporting greater shellfish production.⁴⁴ Third, the Commissioner could also use Virginia’s public trust doctrine as justification for higher productivity requirements.⁴⁵ The additional explicit inclusion of the public trust doctrine among the factors listed in the new legislation indicates that the Commission should

³⁷ *Id.*; VA. CODE ANN. § 28.2-1205 (2005).

³⁸ VA. CODE ANN. § 28.2-625.

³⁹ Aquaculture Work Group Report, *supra* note 11, at 6.

⁴⁰ *Oysters*, NAT’L OCEANIC & ATMOSPHERIC ADMIN. - CHESAPEAKE BAY OFF., www.chesapeakebay.noaa.gov/fish-facts/oysters (last accessed July 15, 2019); *Oyster Fact Sheet*, CHESAPEAKE BAY FOUND., www.cbf.org/about-the-bay/more-than-just-the-bay/chesapeake-wildlife/eastern-oysters/oyster-fact-sheet.html (last accessed July 15, 2019).

⁴¹ See *Oysters*, *supra* note 40; *Oyster Fact Sheet*, *supra* note 40. Questions remain regarding oysters’ overall net impact on the nitrogen cycle. However, although oysters do not directly remove nitrogen from their habitat, oysters do consume harmful aquatic compounds containing nitrogen (such as plankton and detritus), removing them from the water column and expelling them as solid waste compounds which collect on the bottom. Heather Flanagan, *Oysters and Nitrogen Removal from the Water Column*, BILLION OYSTER PROJECT (March 6, 2017), <https://billionoysterproject.org/oysters-and-nitrogen-removal-from-the-water-column/>; *Gem of the ocean*, THE ECONOMIST (Dec. 18, 2008) (citing Bill Goldsboro, senior scientist at the Chesapeake Bay Foundation), <https://www.economist.com/christmas-specials/2008/12/18/gem-of-the-ocean> (last accessed Apr. 27, 2019). On the bottom, the nitrogen compounds then enter the denitrification process and eventually evaporate into the atmosphere as harmless nitrogen gas. *Id.* Furthermore, oysters benefit water quality by removing cloudy sediment from the water, which reduces excess heat adsorption and allows more sunlight into the water column for photosynthetic organisms. *Id.*

⁴² Kari Eckdahl, *From farm to your table, oysters offer a sustainable choice*, NAT’L OCEANIC & ATMOSPHERIC ADMIN., FISHERIES, W. COAST REGION (2016), www.westcoast.fisheries.noaa.gov/stories/2016/26_08262016_sustainable_oyster_farming.html. Because oysters do not require feed or freshwater, oyster aquaculture is one of the least environmentally harmful ways to produce protein for human consumption. *Id.*

⁴³ *Id.*

⁴⁴ VA. CODE ANN. §§ 28.2-613, -1205.

⁴⁵ *Id.*; VA. CONST. art. XI, § I.

consider what shellfish production level would benefit “all citizens,” not just one particular interested party.⁴⁶ Aquaculture produces many benefits for the people of Virginia, including serving as a source of food, employment, and economic activity. More intensive and efficient production would lead to a more sustainable food source, more employment, and greater economic growth—in other words: greater benefit for all Virginians. The legislature has granted VMRC the authority and discretion to determine adequate use, enjoyment, benefit, and, therefore, the productivity of the aquaculture leases.⁴⁷ The Commission could assert that more intensive aquaculture yields proportionally more economic and environmental benefits to the people of the Commonwealth, and, therefore, insufficient productivity constitutes insufficient use and enjoyment of bottomlands leased for that productive purpose. Thus, VMRC could use water quality, marine and fisheries resources, and public trust doctrine factors in support of a higher productivity requirement for renewing and transferring regular planting ground leases.

The other factors considered may not weigh in favor of, or may even weigh against, a higher productivity standard for lease transfers and renewals. Sections 28.2-613 and 28.2-625 also require the VMRC Commissioner to consider impacts on “tidal wetlands,” “adjacent or nearby properties,” and “submerged aquatic vegetation (SAV),” and “other reasonable and permissible uses of state waters and state-owned bottomlands.”⁴⁸ Nearby properties include waterfront property owners, some of whom have been vocal against more intensive aquaculture.⁴⁹ Additionally, potential conflicts arising due to navigation and the noise, sight, and smells of shellfish production could increase with more intensive production.⁵⁰ Some believe the benefits to localities’ tax revenues from increased commercial aquaculture activity may be offset by reductions in local property value, especially luxury and vacation properties that are more dependent on aesthetics. Some stakeholders also claim that aquaculture structures harm SAV, which is protected by Virginia law.⁵¹ However, evidence suggesting a neutral or even positive relationship between aquaculture structures and SAV exists as well.⁵² The Commissioner has the authority and responsibility to weigh these factors against those that could support higher productivity requirements for lease transfers and renewals.

⁴⁶ VA. CODE ANN. § 28.2-1205(A); *Palmer v. Commonwealth Marine Res. Comm’n.*, 628 S.E. 2d 84, 89-90 (Va. Ct. App. 2006).

⁴⁷ VA. CODE ANN. §§ 28.2-613, -1205.

⁴⁸ VA. CODE ANN. §§ 28.2-613, -1205.

⁴⁹ See Aquaculture Work Group Report, *supra* note 11.

⁵⁰ *Id.*

⁵¹ VA. CODE ANN. § 28.2-1204.1 (1999).

⁵² ROGER MANN ET AL., VA. DEP’T OF ENVTL. QUALITY (2018),

<https://www.deq.virginia.gov/Portals/0/DEQ/CoastalZoneManagement/FundsInitiativesProjects/task71-17.pdf>.

According to an initial study by the Virginia Institute of Marine Science, SAV has grown in and around leases containing intensive aquaculture operations. This finding suggests that aquaculture may not be harmful to SAV, which would make obsolete the statutes and regulations that aim to curb aquaculture for the sake of SAV. Shellfish growers have even contended that intensive aquaculture’s filtration lets more light reach the bottom, which stimulates SAV to grow around aquaculture structures and give the appearance that the structures were placed in the middle of a SAV bed. *Status of Clam Culture in the United States*, VA. INST. OF MARINE SCI. 19 (2000), www.vims.edu/GreyLit/VIMS/mrr00-7ocr.pdf.

If VMRC decides that intensive aquaculture production “is in the public interest” and provides a substantial “public benefit,” §§ 28.2-613 and 28.2-625 now provide increased statutory support for denying renewals and transfers for leases deemed insufficiently productive. Although it lacks specifics, this language grants VMRC power to determine beneficial use based on a set of factors. This standard provides VMRC with a flexible, but ultimately vague and somewhat subjective, standard for its beneficial use requirement.

It can be instructive to look at other states’ proof of use requirements for bottomland leaseholders. Approaches taken in other states can generally be divided into two categories: quantitative input or output requirements, and more open-ended active use criteria.

Quantitative Input or Output Requirements. Maryland requires leaseholders to “actively use” their leases, which includes “[a]nnually planting at least one-fourth of the leased area at a minimum density of 1,000,000 shellfish seed per acre.”⁵³ This quantitative standard is simple to measure and provides a clear legal basis for enforcement of a minimum beneficial use standard. However, Maryland’s Department of Natural Resources does hold the authority to waive the active use requirements upon “showing that conditions not present at the time of execution of the lease, including the unavailability of shellfish seed, prevent active use of the leased area.”⁵⁴ Additionally, leaseholders may appeal for review of the Department’s decision by the Secretary within thirty days.⁵⁵ Similar minimum planting or production requirements, and associated waivers and opportunities for appeal, also exist in Florida,⁵⁶ Delaware,⁵⁷ and North Carolina.⁵⁸

Active Use Criteria. Rather than specifying minimum planting or production amounts, other states gather information from leaseholders via site visits, questionnaires, and annual reports to identify other factors relevant to the active use determination. For example, for Atlantic Coast leases, New Jersey requires completion of an annual lease utilization report.⁵⁹ The one page form is structured as a fillable chart where the leaseholder provides information regarding the number of days spent engaged in shellfish activity, the number of planted hard clams, the number of planted oysters, whether there is protective screening, and an open-ended column for any additional remarks.⁶⁰ Shellfish activity includes “planting shellfish, harvesting shellfish, bed preparation, planting shell, predator control and maintenance.”⁶¹ Suffolk County, New York – which developed and manages shellfish aquaculture within a defined area pursuant to authority provided in New York State Environmental Conservation Law § 13-0302 – has a “substantial shellfish activity” standard which is defined as “a good faith effort to prepare an aquaculture site; acquire financing, equipment and/or seed; plant, cultivate, or harvest cultivated product; or show other shellfish

⁵³ MD. CODE ANN., NAT. RES. §§ 4-11A-09 (2012), 4-11A-10 (2019).

⁵⁴ MD. CODE ANN., NAT. RES. § 4-11A-10.

⁵⁵ *Id.*

⁵⁶ FLA. ADMIN. CODE ANN. r. § 18-21.020 (2019).

⁵⁷ 7-3000-3800 DEL. CODE REGS. § 1 (LexisNexis 2014).

⁵⁸ 15A N.C. ADMIN. CODE 30.0201 (2017).

⁵⁹ *2016 Shellfish Lease Utilization Report*, N.J. DIV. OF FISH & WILDLIFE (2016), https://www.state.nj.us/dep/fgw/pdf/2016/shellfish_lease_utilization_rpt_16.pdf.

⁶⁰ *Id.*

⁶¹ *Id.*

aquaculture-related activity[.]”⁶² In order for Suffolk County to determine whether this standard is met, the leaseholder is required to submit an annual report of lease activities.⁶³ The fourteen page form requests detailed information including the lease type, type of culture operation, species being cultivated, shellfish stock source, description and location of gear onsite, harvest method, year of most recent gear purchased (including the type of gear and what state it was purchased from), quantity of seed planted, quantity of shellfish harvested, description of onsite shellfish activities, description of predator control measures conducted, number of employees and their time spent onsite, and where and how the shellfish product is distributed.⁶⁴

To provide more certainty regarding what is meant by “beneficial use” for purposes of lease renewals and transfers, VMRC could develop either specific, quantitative input or output requirements or more flexible active use criteria that consider a variety of factors. If “beneficial use” is viewed narrowly to mean production and harvest of shellfish, then specific, quantitative input or output requirements provide a clear indication of how that standard is to be met. However, if “beneficial use” is viewed more broadly, additional flexibility would be needed to make a determination. Under this broader interpretation approach, active use criteria that consider a variety of factors relating to the use of the leased grounds would be more appropriate.

IV. ADDITIONAL CONSIDERATIONS

Fee Structures. As discussed above, the 2019 legislation created a new application fee system for all private leasing grounds. Previously, applicants had to pay a \$25.00 application fee, all costs to survey the plat, and \$1.50 for every assignment recorded by VMRC.⁶⁵ Now, the legislature has abolished the \$1.50 recording fee, maintained the survey costs requirement, and implemented higher application fees that correspond to the size of the plat to be leased.⁶⁶ To lease a plat smaller than five acres the applicant owes \$300.00; for a plat between five and twenty-five acres the applicant owes \$500.00; and for a plat larger than twenty-five acres the applicant owes \$1000.00.⁶⁷ If a decedent’s lease is not transferred to a qualified leaseholder within eighteen months, the lease becomes vacant and available for assignment.⁶⁸

The 2019 legislation also modified the fees for transferring leases in a similar manner.⁶⁹ Transfer fees now operate on the same scale: \$300.00 to transfer a plat under five acres, \$500.00 to transfer a plat between five and twenty-five acres, and \$1000.00 to transfer plats larger than twenty-five acres.⁷⁰ Like the application process, the transfer process also requires the transferor

⁶² N.Y. ENVTL. CONSERV. LAW § 13-0302 (2004).

⁶³ *Shellfish Aquaculture Lease Program Leaseholder Annual Report Form*, SUFFOLK CTY., https://www.suffolkcountyny.gov/Portals/0/formsdocs/planning/EnvPlanning/Aquaculture/Sept2018/LeaseholderAnnualReportForm_9-28-18.pdf (last accessed July 15, 2019).

⁶⁴ *Id.*

⁶⁵ Compare VA. CODE ANN. § 28.2-608 (1992) with VA. CODE ANN. § 28.2-608 (2019).

⁶⁶ VA. CODE ANN. § 28.2-608 (2019).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Compare VA. CODE ANN. § 28.2-625 (1992) with VA. CODE ANN. § 28.2-625 (2019).

⁷⁰ VA. CODE ANN. § 28.2-625 (2019).

to pay for any new survey made by the VMRC Commissioner, which is required if the plat is being subdivided into multiple parcels.⁷¹ Recent legislation also called for the VMRC to set a fee structure for those applying for lease renewal.⁷² This legislation directed that the renewal fee “reflect the cost to the Commission of processing the renewal application, but shall not exceed \$300”.⁷³ AMAC recently convened with industry representatives to collect input regarding a proposed lease renewal fee of \$150.00.⁷⁴

The increased application and transfer fees enacted this year can serve to deter obstructive leases by increasing the cost of leasing without production. Furthermore, now that obstructive lease applicants are less likely to obtain planting grounds due to increased discretion for the VMRC, leaseholders that do obtain leases at the new higher cost should be incentivized to increase their productivity with more intensive operations. However, these higher costs may favor larger corporate aquaculture operations and reduce accessibility for new aquaculture entrepreneurs. Another issue is that, currently, these increased fees flow to the Commonwealth’s General Fund that can be utilized for a variety of reasons. The legislature could consider either expressly directing these funds to VMRC or creating a proportionate appropriation from the state budget to VMRC to support the agency’s capacity to administer and enforce the leasing program.

Length of Lease Term. If the legislature wishes to reduce the number of leases held by obstructive leaseholders, it could incentivize turnover and increase availability to more intensive operations by shortening future lease durations. Or, for the same purpose, the General Assembly may consider amending § 28.2-625(7), which states that lease transfers create a new ten-year term for that lease,⁷⁵ to instead have transferees continue the current ten-year lease term. This would prevent obstructive leaseholders from avoiding harvest reporting, renewal considerations, or other VMRC enforcement measures designed to prevent obstructive leases.

V. CONCLUSION

The framework for the management of Virginia’s private leasing grounds is changing. The scope of VMRC’s review when considering applications and renewals has expanded and the program’s associated fee structures have increased. Additional steps to deter unproductive use of private leasing grounds can be taken, if that is the goal of the Commonwealth. VMRC could require more detailed information regarding the planned use of the private leasing grounds at the time of initial application or transfer. As VMRC develops its beneficial use criteria, the agency must first determine what uses qualify as beneficial. If the amount of shellfish production is the focus, then perhaps quantitative input and/or output requirements could be established. However, if other uses, such as education or restoration, are also considered beneficial, then more open-ended criteria may be more applicable. In addition, the Commonwealth could consider directing the newly increased fees to VMRC in order to increase its capacity, and modifying the duration of lease terms.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Audio Recording: Aquaculture Management Advisory Committee June Meeting, *supra* note 20.

⁷⁵ V.A. CODE ANN. § 28.2-625(7).