

1 Guideline Document concerning Oyster Planting Grounds Lease Renewal Approval, Lease
2 Renewal Denial, and Commission Hearings for Lease Renewal Denials.

3 A. Purpose:

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- 5 1. The purpose of these guidelines is to make available to oyster planting ground
6 leaseholders and the public-at-large the policies and procedures of the Marine Resources
7 Commission related to the review, and subsequent renewal, or denial of oyster planting
8 grounds pursuant to 28.2-613 of the Code of Virginia. This guidance document will be
9 used by VMRC staff in its decision making process, provide a framework for the
10 Commission upon appeal of oyster planting ground lease denials, and inform citizens of
11 the factors used to determine whether to renew existing oyster planting ground leases.
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 - 13 2. The guidelines herein are provided in conjunction with VMRC regulation 4VAC 20-
14 1350-10 et. Seq.; Code of Virginia requirements contained within 28.2-613 of the Code
15 of Virginia; and the public trust doctrine.
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 - 17 3. When a lease renewal is denied at the staff level, the leaseholder may appeal that decision
18 and request a hearing before the Commission as provided by the Code of Virginia 28.2-
19 216, 28.2-217 and by Regulation 4 VAC 20-1350-10 et. Seq.
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21 B. Authority:

22 Changes that were made at the 2019 General Assembly went into effect on February 27, 2019
23 to 28.2-613 of the Code of Virginia for the requirements that the Commission review each
24 regular oyster planting ground lease upon expiration of each ten-year lease term. 28.2-613, as
25 amended in 2019 (*new Code language in italics and underlined*) states: Upon expiration of the
26 initial or any subsequent term of the assignment, the Commission shall, on application of the
27 holder, renew the assignment for an additional 10-year term. The Commission shall not renew
28 or extend an assignment where there has been no significant production of oysters or clams,
29 no reasonable plantings of oysters, clams or cultch or no significant oyster or clam aquaculture
30 operation, during any portion of the 10-year period immediately prior to the application for
31 renewal, unless the Commission finds that there was good cause for the failure to produce or
32 plant oysters, clams or cultch or finds that the assignment is directly related to and beneficial
33 to the production of oyster-planting grounds immediately adjacent to the assignment. In
34 determining whether there was good cause for the failure to produce or plant oysters, clams, or
35 cultch, in addition to other factors, the Commission shall decide whether the renewal is in the
36 public interest considering the factors in subsection A of § 28.2-1205, the prevalence of the
37 diseases MSX and Dermo, the public benefits and impacts of shellfish aquaculture, and
38 whether the oyster-planting ground has traditionally produced commercial quantities of
39 oysters or clams. The Commission shall set by regulation a fee structure for renewal fees to be
40 paid by applicants. Such fees shall seek to reflect the cost to the Commission of processing the
41 renewal application, but shall not exceed \$300.

42 The Commission adopted Regulation 4 VAC 20-1350-10 et. Seq. with an effective date of
43 October 1, 2019, which establishes the procedures to request lease renewal, approved a
44 renewal processing fee of \$150.00 per lease, and provided a time-frame for appeal and
45 subsequent Commission hearing to review any lease renewal denial.

46 Therefore, 28.2-613 of the Code of Virginia provides the conditions concerning the use of
47 oyster planting ground leases and renewal of such leases when significant production of
48 shellfish has occurred and/or when there has been reasonable plantings of oysters, clams or
49 cultch, or aquaculture operation, or to deny such renewals when such production and/or
50 reasonable plantings, or aquaculture operation have not occurred. 28.2-613 further provides
51 the Commission the authority to renew such leases if it is found there is good cause for failure
52 to produce or plant oysters, clams or cultch. These guidelines shall provide leaseholders with
53 the Code provided provisions, along with other additional rationale, that the Commission may
54 consider for a lease renewal when production/planting thresholds have not been met.

55 C. Lease Renewal Propagation Criteria:

56 These guidelines provide renewal criteria for leaseholders during the ten-year lease term and
57 serve to assist VMRC staff when evaluating such leases. When a lease is denied by VMRC this
58 guideline document can also assist the Commission at any subsequent hearing for review of such
59 lease renewal denial.

60 This document provides guidance concerning both lease production and plantings, as well as
61 providing a non-exclusive list of other factors staff and/or the Commission shall consider when
62 determining whether to renew a lease, if production and planting requirements are not met.
63 Failure to return the Application for Reassignment of Oyster Planting Ground or failure to pay
64 the \$150 fee for such renewal review **by the end of the current ten year lease term will result**
65 **in denial of the lease renewal.**

66 For renewal of an existing lease, 28.2-613 requires significant production, reasonable plantings
67 of shellfish or cultch, or significant aquaculture operation during any portion of the 10-year
68 period of the lease term. To facilitate administration of these requirements following criteria are
69 established:

- 70 1. Use of mandatory reporting data shall be used to determine harvest amounts. Significant
71 aquaculture operation or hand tong/hand harvest shall be harvest of one bushel per acre
72 per year as the minimum requirement for lease renewal (For clams the harvest
73 requirement shall be 400 clams per acre per year). If there are no mandatory reporting
74 discrepancies and a minimum harvest equal to one bushel per acre per year (or 400 clams
75 per acre per year) is documented, the lease will be renewed. (*Note: If the leaseholder
76 believes that significant harvest has occurred during the current ten year renewal period
77 and they do not have specific records going back up to ten years, they may state on the
78 renewal form, "see mandatory reporting for this lease". Provided such mandatory
79 reporting confirms a minimum harvest as required above, the lease shall be renewed).

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- 82 2. If shellfish harvest was obtained by use of a dredge or scrape permit and such harvest
83 meets minimum requirements of one bushel per acre per year the lease shall be renewed,
84 however, when harvest was obtained by the use of a dredge or scrape permit and the
85 leaseholder has no records of reasonable planting of seed oysters or shell on the lease
86 during the current lease renewal term, the lease shall not be renewed. Reasonable seed or
87 shell plantings shall be considered to be 100 bushels of seed or shell per acre per year, or
88 a minimum of 1 bushel of shell or seed planted for each bushel of oysters harvested,
89 whichever is lower. If the leaseholder claims the lease is self-sustaining without the need
90 to plant either seed or shell, VMRC staff shall field verify that the lease contains adequate
91 shellstock and/or sufficient shell cultch material and if verified the lease shall be
92 renewed. (*Note: This planting provision requirement shall start upon the effective date
93 of adoption of these guidelines).
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- 95 3. When harvest reported on the lease application renewal form does not reasonably match
96 harvest reported data within the mandatory reporting program, such discrepancy will be
97 referred to the Fisheries Management Division mandatory reporting program for
98 reconciliation.
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- 100 4. If total harvest data do not meet the required minimum effort, then shell, cultch, seed
101 planting effort, and aquaculture use will be considered. For the lease to be renewed an
102 effort of one bushel of combined harvest/production/planting per acre per year over the
103 entire ten year period will result in the lease being renewed. This effort can include
104 harvest, seed production or planting, shell or cultch planting, use of the area for nursery
105 growing, or aquaculture shellfish production. For shell, cultch, spat on shell, seed
106 planting, or aquaculture production, information of amounts deployed shall be provided.

107 Significant production, reasonable plantings and per acre effort per year is considered in totality
108 for the entire ten year lease term and such production and/or planting can occur during any
109 portion of the ten year lease term.

110 D. Lease Renewal Effort Criteria:

111 When the effort levels noted above are not achieved, 28.2-613 of the Code allows for renewal of
112 the lease provided the Commission finds that there was good cause for failure to produce
113 shellfish, or to plant shellfish or cultch, in addition to other factors, whether the renewal is in the
114 public interest considering the factors in subsection A of 28.2-1205 of the Code:

115 Pursuant to the Code of Virginia, section 28.2-613:

- 116 • If the lease is directly related to and beneficial to the production of oyster-planting
117 grounds immediately adjacent to the lease being considered for renewal (documentation
118 required of how lease is related to or beneficial to the production of grounds adjacent to
119 the lease).
- 120 • The prevalence of the diseases MSX and Dermo (documentation required of testing data
121 to confirming the presence and impact of MSX and/or Dermo).

- 122 • The public benefits and impacts of shellfish aquaculture (benefits may include, water
123 quality improvement, erosion control, food production, etc.; impacts may include,
124 navigation impacts, pier or other authorized structure encroachments, view shed issues,
125 noise, smell, improper gear maintenance, presence of SAV, conflicts with other uses of
126 the area, etc.).
- 127 • Whether the ground has traditionally produced commercial quantities of oysters or clams
128 (documentation required of historic production to include quantities and dates of
129 production/harvest).

130 Pursuant to the Code of Virginia, subsection A of 28.2-1205:

- 131 • Other reasonable and permissible uses of state waters and the state-owned bottomlands;
- 132 • Marine and fisheries resources of the Commonwealth.
- 133 • Tidal wetlands, except when this has or will be determined under the provision of
134 Chapter 13 of Subtitle III the Code of Virginia.
- 135 • Adjacent or nearby properties (close proximity to upland property, navigation, existing
136 leases, existence of piers or other authorized structures within lease area, etc.).
- 137 • Water quality.
- 138 • Submerged aquatic vegetation (SAV) (VMRC has a SAV guidance policy concerning
139 impacts associated with oyster ground leases).

140 Additional factors that can be considered by the Commission when considering whether to renew
141 a lease:

- 142 • Use of the lease for husbandry, nursery, seed growing, or broodstock (detailed
143 explanation and rationale for such use).
- 144 • Wet storage (documentation required for such use, provide Health Department permit
145 info if applicable).
- 146 • Restoration efforts (permits, receipts or other documentation required).
- 147 • Water quality improvement (verified water quality credits or other relevant
148 documentation required).
- 149 • Erosion control (permits, receipts or other documentation required).
- 150 • Rotation with other leased areas (list other lease(s) in rotation scheme, time frame of
151 rotation).
- 152 • Shellfish aquaculture production activity that requires a permit, over or upon the lease
153 (provide permit documentation).
- 154 • *Buffer of productive area within lease or an adjacent lease (provide lease info on area
155 being buffered, rationale for buffer claim) (*VMRC may, in consultation with the
156 leaseholder, require lease boundary reduction for renewal if buffer area deemed too large,
157 for areas unsuitable for shellfish propagation, or approve those portions of the lease area
158 where aquaculture activities are located).
- 159 • Education (documentation of educational component required).
- 160 • Eco-tourism directly related to shellfish production (provide proof of eco-tourism activity
161 related to lease).

- 162 • An operational plan which may include use of multiple leases for seed propagation,
163 nursery, multiple leases rotation, best management practices, buffers, or aquaculture
164 (enclosures) husbandry activities (copy of actual plan required)
- 165 • Use of the lease for recreational harvest commensurate with the size of the leased area.
- 166 • Severe adverse catastrophic events and/or other localized environmental conditions
167 causing mortality, or significant loss of production or production marketability.

168 Having a lease within a Health Department restricted waters classification area shall not be
169 considered a valid reason for not attempting to propagate shellfish during the ten year lease term.

170 E. Lease Denial Hearing Procedures:

171 If lease renewal, or partial lease renewal is denied at the staff level the leaseholder may request a
172 hearing before the Commission. Any request for a formal hearing to appeal a lease renewal
173 denied pursuant to 4 VAC20-1350-10 ET. SEQ., must be received or postmarked no later than
174 60-days from the date that notice of the denial decision is received. Such a hearing shall be
175 considered a formal hearing under the rules of the Code of Virginia Title 28.2 Fisheries and
176 Habitat of the Tidal Waters, Subtitle II, Tidal Fisheries, Chapter 2, General Provisions, Article 3,
177 Proceedings and Actions (28.2-216-28.2-217).

178 The Commission shall use this guidance document when considering any additional information
179 provided by the leaseholder, after any lease denial, but prior to or at the hearing. Upon receipt of
180 a request for a hearing, staff will request any such information from the leaseholder before any
181 hearing is scheduled, and if received, will, based on any such information, provide a staff
182 evaluation and revised recommendation to the Commission at the hearing. No hearing will be
183 scheduled until the required \$150 fee is paid.

184 A copy of this document shall be provided to all leaseholders, and placed on the Commission
185 web site, as soon as practicable upon Commission approval. For leases with renewal due dates
186 that occur after the adoption of these guidelines through February 27, 2029, a measured approach
187 to such renewals shall take into account that records may not have been kept prior to February
188 27, 2019 related to the renewal criteria contained in these guidelines (other than as described in
189 C. 1, for mandatory harvest reported, and C. 2, for seed, shell, cultch planting). All leases with a
190 renewal date after February 27, 2029, shall be reviewed under the full requirements of these
191 guidelines. Effective date: January 1, 2021.

192 Commission approval date: December 8, 2020.

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