

Guideline Document: Oyster Planting Grounds Lease Renewal Approval, Lease Renewal Denial, and Commission Hearing Procedure for Lease Renewal Denial.

A. Purpose:

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

B. Authority:

Changes that were made at the 2019 General Assembly went into effect on February 27, 2019 to 28.2-613 of the Code of Virginia for the requirements that the Commission review each regular oyster planting ground lease upon expiration of each ten-year lease term. 28.2-613, as amended in 2019 (*new Code language in italics and underlined*) states: Upon expiration of the initial or any subsequent term of the assignment, the Commission shall, on application of the holder, renew the assignment for an additional 10-year term. The Commission shall not renew or extend an assignment where 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, unless the Commission finds that there was good cause for the failure to produce or plant oysters, clams or cultch or finds that the assignment is directly related to and beneficial to the production of oyster-planting grounds immediately adjacent to the assignment. In determining whether there was good cause for the failure to produce or plant oysters, clams, or cultch, in addition to other factors, the Commission shall decide whether the renewal is in the public interest considering the factors in subsection A of § 28.2-1205, the prevalence of the diseases MSX and Dermo, the public benefits and impacts of shellfish aquaculture, and whether the oyster-planting ground has traditionally produced commercial quantities of oysters or clams. The Commission shall set by regulation a fee structure for renewal fees to be paid by applicants. Such fees shall seek to reflect the cost to the Commission of processing the renewal application, but shall not exceed \$300.

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

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

C. Lease Renewal Propagation Criteria:

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

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

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

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

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

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

D. Lease Renewal Effort Criteria:

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

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

- If the lease is directly related to and beneficial to the production of oyster-planting grounds immediately adjacent to the lease being considered for renewal (documentation required of how lease is related to or beneficial to the production of grounds adjacent to the lease).
- The prevalence of the diseases MSX and Dermo (documentation required of testing data to confirming the presence and impact of MSX and/or Dermo).
- The public benefits and impacts of shellfish aquaculture (benefits may include, water quality improvement, erosion control, food production, etc.; impacts may include, navigation impacts, pier or other authorized structure encroachments, view shed issues, noise, smell, improper gear maintenance, presence of SAV, conflicts with other uses of the

area, etc.).

- Whether the ground has traditionally produced commercial quantities of oysters or clams (documentation required of historic production to include quantities and dates of production/harvest).

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

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

Additional factors that can be considered by the Commission when considering whether to renew a lease **to the extent allowed by law:**

- Use of the lease for husbandry, nursery, seed growing, or broodstock (detailed explanation and rationale for such use).
- **Whether the leaseholder, or its related entities or persons, is able to meet the significant production criteria, on average, across the entirety of its leases.**
- Wet storage (documentation required for such use, provide Health Department permit info if applicable).
- Restoration efforts (permits, receipts or other documentation required).
- Water quality improvement (verified water quality credits or other relevant documentation required).
- Erosion control (permits, receipts or other documentation required).
- Rotation with other leased areas (list other lease(s) in rotation scheme, time frame of rotation).
- Shellfish aquaculture production activity that requires a permit, over or upon the lease (provide permit documentation).
- *Buffer of productive area within lease or an adjacent lease (provide lease info on area being buffered, rationale for buffer claim) (*VMRC may, in consultation with the leaseholder, require lease boundary reduction for renewal if buffer area deemed too large, for areas unsuitable for shellfish propagation, or approve those portions of the lease area where aquaculture activities are located).
- Education (documentation of educational component required).
- Eco-tourism directly related to shellfish production (provide proof of eco-tourism activity related to lease)
- An operational plan which may include use of multiple leases for seed propagation, nursery, multiple leases rotation, best management practices, buffers, or aquaculture (enclosures) husbandry activities (copy of actual plan required)

- Use of the lease for recreational harvest commensurate with the size of the leased area.
- Severe adverse catastrophic events and/or other localized environmental conditions causing mortality, or significant loss of production or production marketability.

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

E. Lease Denial Hearing Procedures:

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

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

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

Effective date: April 1, 2021.

Commission approval date: March 23, 2021.