

**TRANSMITTAL SHEET FOR
NOTICE OF INTENDED ACTION**

Control No. 220 Department or Agency Conservation and Natural Resources

Rule No.: 220-4-.17 Shellfish Aquaculture Easements

New Amend Repeal (of Existing Rule) Adopt by Reference

Would the absence of the proposed rule significantly harm or endanger the public health, welfare, or safety? YES

Is there a reasonable relationship between the state's police power and the protection of the public health, safety, or welfare? YES

Is there another, less restrictive method of regulation available that could adequately protect the public? NO

Does the proposed rule have the effect of directly or indirectly increasing the costs of any goods or services involved and, if so, to what degree? NO

Is the increase in cost, if any, more harmful to the public than the harm that might result from the absence of the rule? N/A

Are all facets of the rulemaking process designed solely for the purpose of, and so they have, as their primary effect, the protection of the public? YES

Does the proposed rule have any economic impact? NO

If the proposed rule has an economic impact, the proposed rule is required to be accompanied by a fiscal note prepared in accordance with subsection (f) of Section 41-22-23, Code of Alabama 1975.

Certification of Authorized Official

I certify that the attached proposed rule has been proposed in full compliance with the requirements of Chapter 22, Title 41, Code of Alabama 1975 and that it conforms to all applicable filing requirements of the Alabama Administrative Procedure Division of the Legislative Reference Service.

Signature of Certifying Officer *Randy Dean*

Secretary of Administrative Procedure

Date *February 20, 2014*

Department of Conservation and Natural Resources
State Lands Division

NOTICE OF INTENDED ACTION

AGENCY NAME: Department of Conservation and Natural Resources

RULE NO. & TITLE: (1) 220-4-.17 Shellfish Aquaculture Easements

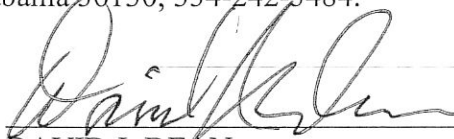
INTENDED ACTION: (1) New.

SUBSTANCE OF PROPOSED ACTION: (1) 220-4-.17 -To provide for the granting of certain easements for the purposes of shellfish aquaculture.

TIME, PLACE, MANNER OF PRESENTING VIEWS: Interested persons may present their views in writing to the Director of the State Lands Division at any time during the period stated below, or orally, if requested in writing 48 hours in advance to the Director of the State Lands Division, by personally appearing at Room 469, Folsom Administrative Building, 64 North Union Street, Montgomery, Alabama, at 10:00 a.m., April 7, 2014.

FINAL DATE FOR COMMENT AND COMPLETION OF NOTICE:
Monday, April 7, 2014.

CONTACT PERSON AT AGENCY: Patricia J. Powell, Director, State Lands Division, 4th Floor, 64 N. Union Street, Montgomery, Alabama 36130, 334-242-3484.



DAVID J. DEAN
Secretary of Administrative Procedure

220-4-.17 Shellfish Aquaculture Easements

(a) For the purposes of this rule, “shellfish aquaculture” shall mean the off-bottom cultivation and harvesting of shellfish for commercial or research-oriented purposes. “Shellfish” for purposes of this rule shall mean all native to Alabama species of oysters, clams, or mussels and scallops.

(b) The purpose of this rule is to provide for the granting of riparian and non-riparian easements for shellfish aquaculture. For the purpose of this rule, “riparian easement” or “riparian shellfish aquaculture easement” shall mean an easement for shellfish aquaculture conducted by individuals with sufficient upland interest in riparian uplands located within an associated riparian use area as defined in Section 9-12-22, Code of Alabama 1975. “Non-riparian easement” or “non-riparian shellfish aquaculture easement” shall mean an easement for the purpose of conducting shellfish aquaculture by individuals not located within an associated riparian use area as defined in Section 9-12-22, Code of Alabama 1975.

(c) The State of Alabama, Department of Conservation and Natural Resources (“DCNR”)’s biological, marine safety and navigation assessments and any other assessments or reports by other agencies with related statutory, management, or regulatory authority may be considered in evaluating specific requests to use state-owned submerged lands. Any such reports sent to the State Lands Division in a timely manner may be considered.

(d) Shellfish aquaculture activities shall not infringe upon any riparian rights existing under law.

(e) Shellfish aquaculture activities shall not unreasonably interfere with navigation. Any area made the subject of a riparian shellfish aquaculture easement shall not be closer than 100 feet from a marked navigation channel.

(f) All shellfish aquaculture easements on state-owned submerged lands shall contain such terms, conditions and restrictions as deemed necessary by DCNR to protect and manage such lands.

(g) Shellfish aquaculture activities on state-owned submerged lands shall be designed to minimize or eliminate adverse impacts on fish and wildlife habitat.

(h) Easements under this rule shall prohibit the cultivation of non-indigenous, or hybrids of non-indigenous, plants and animals.

(i) Shellfish aquaculture easements shall comply with the following:

(1) A shellfish aquaculture easement is only to be used to conduct shellfish aquaculture activities on state-owned submerged lands and the overlying water column, or for such activities associated with an on-shore shellfish aquaculture facility. Shellfish aquaculture docks shall be restricted to the immediate use for allowable shellfish aquaculture activities. Docks used for purposes not immediately associated with shellfish aquaculture

activities shall not be allowed except for private recreational use by upland riparian property owners. Placement of such aquaculture related structures shall be in accordance with the provisions of Rule 220-4-.09 but will be exempt from fees associated with 220-4-.09.

(2) Shellfish aquaculture easements shall contain provisions to ensure that the easement area is marked and that markers are maintained for the term of the easement. Such marking shall be adequate to inform the public of the activity and identify potential navigation and safety hazards.

(3) The area associated with shellfish aquaculture easements shall comply with the following:

(i) For riparian shellfish aquaculture easements a setback of 10 feet from the riparian lines of adjoining riparian upland property owners' riparian use areas shall be required unless a letter of concurrence from the adjoining upland riparian property owner waives the setback requirement or the State Lands Division determines that a reduced or increased setback is required to avoid impacts to existing natural resources, reduce potential navigation hazards, or avoid potential infringement on an adjoining upland riparian property owner's riparian use area as determined in accordance with Section 9-12-22 Code of Alabama 1975;

(ii) A non-riparian shellfish aquaculture easement shall not be approved when the easement location is determined by DCNR to potentially infringe upon riparian rights or riparian use area of an adjoining riparian upland property owner as defined in Section 9-12-22, Code of Alabama 1975, unless the applicant obtains a letter of concurrence from the adjoining riparian upland property owner;

(iii) For both riparian shellfish aquaculture easements and non-riparian shellfish aquaculture easements, setbacks from other activities, channels or structures may also be required, as determined necessary, to ensure safety, facilitate enforcement capabilities and ensure resource management; and

(iv) For non-riparian shellfish aquaculture easements, an easement area larger than five acres may not be approved; provided however, that exceptions to the five acre maximum may be made at the discretion of the DCNR Commissioner based on review of mitigating or extenuating circumstances and documentation supporting the same.

(j) Shellfish aquaculture easement application and review process.

(1) Applications for shellfish aquaculture easements shall include the following:

- (i) Name, address and phone number of the applicant;
- (ii) Description of the shellfish aquaculture activities to be conducted, including gear type, expected density of shellfish to be cultivated and whether such activities are to be research oriented or commercial;
- (iii) A statement describing the applicant's capabilities to conduct the proposed activities;
- (iv) Location of the proposed activity including: county; section, township and range; water body; and a vicinity map;
- (v) In the case of riparian easements, satisfactory evidence of sufficient upland interest;
- (vi) Names and addresses, as shown on the latest county tax assessment roll, of each owner of property adjoining the parcel sought, prepared from current records of the county property appraiser;
- (vii) A statement describing the potential impacts of the proposed use on the ecology of the area, including fish and wildlife habitat; and
- (viii) A statement explaining why the easement is in the public interest, or at a minimum, not contrary to the public interest.

(2) In addition, applications for easements that include docks or other aquaculture-related structures connected to upland which require use of the water column shall include the following, as applicable:

- (i) A detailed statement describing the proposed activities, including the project design and description of all operations.
- (ii) A detailed and dimensioned site plan drawing showing:
 - a. The approximate mean or ordinary high water line;
 - b. The location of wetland, shoreline and aquatic vegetation and other submerged resources;
 - c. The location of the proposed structures and any existing structures;
 - d. The location of intake and discharge pipelines, pumps,

culture units, and tanks;

e. The applicant's upland parcel property lines and zoning restrictions; and

f. The location of the nearest natural or artificial navigation channel.

(3) Two prints of a survey of the easement area, including GPS coordinates of area corners, which shall constitute the field survey, and the accompanying legal description and acreage, shall be submitted subsequent to final approval of the application but prior to issuance of the easement of the parcel sought; prepared, signed, and sealed by a person properly licensed by the State of Alabama as a professional land surveyor, or an agent of the federal government authorized to do such surveys under federal law. Preliminary site approval can be based upon marking off the general configuration of the parcel sought, including the acreage of the parcel, latitude and longitude coordinates for the corners of the parcel identified using a Global Position System on a topographic map or a navigation chart.

(4) Original applications and renewals shall be reviewed by DCNR to determine the following:

(i) That the proposed shellfish aquaculture activity is water dependent;

(ii) That the proposed project and operation is directly related to shellfish aquaculture;

(iii) Whether, in the case of proposed non-riparian easements or riparian easements associated with other state-owned riparian rights, a competitive market exists for the easement such that it is required to be competitively bid pursuant to the provisions of Sections 9-15-70, et seq., of the Code of Alabama 1975;

(iv) The impact of the proposed shellfish aquaculture easement on natural resources, as determined by DCNR;

(v) Whether the proposed aquaculture activity adversely affects a public shellfish reef;

(vi) That the size of area requested for easement is appropriate to the use;

(vii) The suitability of the site for the granting of an easement;

- (viii) The effect on public health, safety, welfare, or property of others; that the proposed construction or operations do not constitute a hazard to navigation, as determined by the State of Alabama, Department of Conservation and Natural Resources, Marine Police Division, or their successor agency, or interfere with a riparian property owner's access to navigable water; and
- (ix) The need for special easement conditions.

(k) Shellfish aquaculture easements.

(1) Each shellfish aquaculture easement document shall at a minimum contain the following:

- (i) The term of the easement, which shall not exceed five years with the right to renew for an additional five years upon mutual agreement, or upon such renewal provisions as provided for in a competitively bid easement for non-riparian easements and riparian easements associated with state-owned riparian rights, if applicable;
- (ii) The amount of fee per acre, or fraction thereof, for the easement, which shall take the form of a fixed annual fee to be paid throughout the term of the easement and any renewal thereof, subject to annual adjustment based on the Consumer Price Index as otherwise provided herein;
- (iii) A requirement that the easement holder shall comply with any special easement conditions and applicable best management practices, if any, for the specific shellfish aquacultural activity;
- (iv) A provision regarding the removal or other treatment within 120 days of all improvements and disposition of any aquaculture products upon the termination or cancellation of the easement, subject to the approval of DCNR ;
- (v) A statement that the easement may not be assigned sublet or transferred in any manner, in whole or in part, without the prior written approval of the DCNR Commissioner. Failure of the easement holder to obtain prior written approval shall be grounds for revocation by DCNR;
- (vi) A provision stating that failure of the easement holder to comply with the terms and conditions of the easement shall be grounds for revocation of the easement; and

(vii) A description of approved culture and harvesting techniques that can be used on the easement area.

(2) The easement area shall be defined by corner and intermediate markers as approved by the State Lands Division. Each corner shall be clearly marked and defined with the easement holder's name and easement number clearly attached. There shall also be established intermediate markers between the corners, the distance between which shall not exceed 600 feet extending from each corner of the easement area to the adjacent corner, and also, if applicable, from the outside corner every 600 feet to the high water mark on the associated beach, bank, or marsh edge.

(3) The obtaining of all required permits and approvals from Federal, state, and local governmental agencies, shall be a prerequisite for the issuance by DCNR of a written Notice to Proceed under the easement. No activities pursuant to any easement shall commence prior to issuance of the Notice to Proceed.

(4) The easement parcel shall not significantly restrict public access for boating, swimming, and fishing.

(I) Consideration for Shellfish Aquaculture Easements.

(1) Annual consideration for the granting of riparian shellfish aquaculture easements shall be as follows: The annual fees shall be the dollar amount of the fixed rate consideration as determined by DCNR, but not less than \$250 per acre or fraction thereof. The annual fee shall be revised March 1 of each year and increased, if required, on the basis of fluctuations of the Consumer Price Index for All Urban Consumers (CPI-U), South Urban, as published by U.S. Department of Labor, Bureau of Labor Statistics. For riparian shellfish aquaculture easements, following execution of an easement, the prorated amount of the first installment of annual consideration shall be due and payable at such time as the easement holder submits a written request to the State Lands Division for issuance of the Notice to Proceed. The prorated amount of the first installment of annual consideration shall be calculated from the effective date of the easement through the last day of the February following the request for the Notice to Proceed. Annual consideration for each subsequent year shall thereafter be due each March 1st for the remainder of the easement term.

(2) Annual consideration for the granting of non-riparian shellfish aquaculture easements or riparian easements associated with other state-owned riparian rights, shall be as follows: The annual fees shall be the dollar amount of the fixed rate consideration as determined by DCNR, subject to the applicable provisions of Sections 9-15-70, et seq., of the Code of Alabama 1975, but not less than \$250 per acre or fraction thereof. Proposed non-riparian shellfish aquaculture easements or riparian easements associated with other state-owned riparian rights, that are over an area where a competitive market exists for the granting of such easements, as determined by DCNR, shall be competitively bid pursuant to the provisions of Sections 9-15-70, et seq., of the Code of Alabama 1975, which process shall determine the annual consideration, but not less than \$250 per acre, or fraction thereof. The annual fee shall be revised March 1 of each year and increased, if required, on the basis of fluctuations of the Consumer Price Index for All Urban Consumers (CPI-U), South Urban, as published by U.S. Department of Labor, Bureau of Labor Statistics. Payment shall be issued to "State of Alabama, Department of Conservation and Natural Resources, State Lands Division". For non-riparian shellfish aquaculture easements and riparian easements associated with other state-owned riparian rights, the prorated amount of the first installment of annual consideration shall be due and payable at execution of an easement by the easement holder. The prorated amount of the first installment of annual consideration shall be calculated from the effective date of the easement through the last day of February. Annual consideration for each subsequent year shall thereafter be due each March 1st for the remainder of the easement term.

(3) Public agencies and institutions engaging in shellfish aquaculture activities which are determined by the DCNR Commissioner to be primarily for a public purpose may be exempted from the payment of the otherwise applicable annual consideration amounts.

Statutory Authority: Sections 9-2-7, 9-2-8, and 9-2-12, Code of Alabama 1975.

PENALTY: As provided by law.