

A COMPARATIVE ANALYSIS OF MARYLAND’S PUBLIC PARTICIPATION  
FRAMEWORK IN COMMERCIAL SHELLFISH AQUACULTURE LEASING: STANDING  
TO PRESENT PROTESTS

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I. INTRODUCTION

People have harvested and consumed oysters in the Chesapeake Bay region for thousands of years.<sup>2</sup> When early European settlers arrived in the Chesapeake Bay, they eventually created an oyster commercial harvest industry in Maryland.<sup>3</sup> However, after the Civil War, the use of new technology that permitted the harvesting of oysters in a shorter time caused a depletion of local oyster beds, which, in turn, caused a shortage of oysters in the market and led to the enactment of Maryland’s first aquaculture law in 1830. The “One-Acre Planting Law” allowed “Maryland citizens to use one acre of [submerged] ground for planting and growing oysters and other shellfish.”<sup>4</sup> Since the enactment of that first aquaculture leasing law, the Court of Appeals of Maryland—the State’s highest court—has consistently interpreted an oyster lease “not [as] a grant binding the State, but [instead as] a conditional license, revocable at the pleasure of the Legislature.”<sup>5</sup> Accordingly, an aquaculture lease issued by the State of Maryland does not grant an exclusive property right to the leaseholder. Rather, the state confers a permission or privilege to the leaseholder to “use portions of state lands covered by navigable water as places of deposit, where the title and possession of the property thus acquired may continue to be protected.”<sup>6</sup>

Oyster growers have faced significant opposition from local “watermen” who make their living harvesting blue crabs, wild finfish, and shellfish including

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<sup>2</sup> From 3,500 to 400 years ago, Native American oyster fisheries existed in the Chesapeake Bay. Torben C. Rick, et al., *Millennial-scale Sustainability of the Chesapeake Bay Native American Oyster Fishery*, 113 PNAS 6568, 6572 (2016) (millennial-scale study about the human harvest of Chesapeake Bay oysters), <https://www.pnas.org/content/pnas/113/23/6568.full.pdf>.

<sup>3</sup> Victor S. Kennedy & Linda L. Breisch, *Sixteen Decades of Political Management of the Oyster Fishery in Maryland’s Chesapeake Bay*, 164 J. ENVTL. SCI. 153, 156 (1983).

<sup>4</sup> *Id.*

<sup>5</sup> *Phipps v. State*, 22 Md. 380, 388 (1864).

<sup>6</sup> *Id.*

oysters.<sup>7</sup> Eventually, political influences of local tidewater politicians and watermen led to the restriction of aquaculture leasing in many of Maryland's counties.<sup>8</sup> In addition, watermen also often successfully protested the approval of new leases. All the "[w]atermen wishing to protest the lease had to [do was] show up in front of the judge and affirm [that] they had caught a day's work from the area [sometime] during the past five years."<sup>9</sup> A watermen protest would result in an area being classified as a natural oyster bottom in which no aquaculture lease could be established.<sup>10</sup>

For more than a century, Maryland's oyster production was more limited than what it could have been.<sup>11</sup> A number of factors, including disease, habitat loss, and harvest pressures, caused the state's oyster stock to significantly decline, while persistent political pressure from watermen blocked efforts to establish a self-sustaining oyster industry through the private cultivation of oysters.<sup>12</sup> Eventually, however, the need to create a process that was simple and accessible to the people interested in engaging in oyster aquaculture led to a call for a significant policy change in the early 2000s. In 2009, Maryland modified its aquaculture regulations to allow for the expansion of the production of oysters through privatization and aquaculture. The modifications to the existing law were enacted to streamline the process for obtaining the authorizations necessary to engage in shellfish production and, in turn, increase the total number of shellfish aquaculture leases in the State.

As intended, starting in 2010 this shift in policy caused a great increase in oyster aquaculture leases issued by the state.<sup>13</sup> Nevertheless, this change has not been without its challenges. Even though the popularity of oyster aquaculture has grown in Maryland, it continues to endure opposition from many sectors,

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<sup>7</sup> *Watermen*, MARYLAND SEA GRANT, <https://www.mdsg.umd.edu/topics/watermen/watermen#:~:text=Called%20watermen%20regionally%2C%20they%20share%20a%20love%20of,watching%20videos%20under%20the%20Chesapeake%20Bay%20Watermen%20playlist> (last visited July 23, 2021).

<sup>8</sup> DONALD WEBSTER, MARYLAND OYSTER CULTURE: A BRIEF HISTORY 4 (2007), [https://extension.umd.edu/sites/default/files/2021-02/1\\_Historical%20Background3.pdf](https://extension.umd.edu/sites/default/files/2021-02/1_Historical%20Background3.pdf).

<sup>9</sup> *Id.*

<sup>10</sup> Kennedy & Breisch, *supra*, note 3, at 156.

<sup>11</sup> *Id.* at 170.

<sup>12</sup> *Id.* at 168; Webster, *supra*, note 8, at 4.

<sup>13</sup> Press Release, Chesapeake Bay Foundation, New Economic Report Details Growth of Oyster Aquaculture in Maryland (Apr. 2, 2020), <https://www.cbf.org/news-media/newsroom/2020/maryland/new-economic-report-details-growth-of-oyster-aquaculture-in-maryland.html>.

translating into a proliferation of protests during the approval of new leases.<sup>14</sup> This is a bigger problem in some counties than others.<sup>15</sup> Although protests are an important part of ensuring public participation in a new lease approval process, they can significantly delay the approval of new leases in the State.<sup>16</sup>

This article analyzes the shellfish aquaculture leasing process in Maryland, including how the law's public participation process impacts the approval of new leases. Specifically, this article examines what factors should be considered when determining whether individuals who file protests to new commercial shellfish aquaculture leases in Maryland have standing. The article engages in a comparative analysis of the difference between the public participation process in the approval of new shellfish aquaculture leases in Washington and Texas with the process established in Maryland. Finally, it discusses possible improvements to Maryland's laws that would help the state reach its goal of increasing the number of leases being issued.

## II. THE MARYLAND LEASING AND PROTEST PROCESS

Maryland defines a commercial shellfish aquaculture lease as a "lease of any submerged land or . . . water column . . . for cultivating oysters or other shellfish for commercial purposes."<sup>17</sup> Accordingly, there are two types of commercial shellfish aquaculture leases in Maryland: (1) water column leases and (2) submerged land leases. A water column lease is "a lease of the column of water on or under the surface of the water and above the surface of the submerged land."<sup>18</sup> A submerged land lease gives the leaseholder a lease to "any land lying beneath the waters of the State leased by the State to any person for cultivating oysters and other shellfish for commercial purposes."<sup>19</sup> The state's General Assembly delegated authority to the Maryland Department of Natural Resources (DNR) to issue aquaculture leases.<sup>20</sup> To obtain a submerged land lease or a water column lease, a person must submit an application to DNR, request a shellfish

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<sup>14</sup> Scott Dance, *Private Oyster Farming Has Helped the Chesapeake Bay. But Not Everyone Is Happy with the Practice*, THE BALTIMORE SUN: ENVIRONMENT (Feb 28, 2019, 5:00 am), <https://www.baltimoresun.com/news/environment/bs-md-aquaculture-growth-20190225-story.html>.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> MD. CODE ANN., NAT. RES. § 4-11A-01(d).

<sup>18</sup> *Id.* § 4-11A-01(p).

<sup>19</sup> *Id.* § 4-11A-01(n).

<sup>20</sup> *Id.* § 4-11A-03(c)(2).

aquaculture harvester permit, and submit a non-refundable fee of \$300.00.<sup>21</sup> The application must also include a declaration that the applicant intends to actively use the lease area for commercial purposes and a detailed proposed plan for doing so.<sup>22</sup>

To grant a submerged land lease in the Chesapeake Bay, DNR must be satisfied that the lease will not be located:

[w]ithin a minimum of 50 feet of shoreline or any pier without the written permission of the riparian owner at the time of initial application for the lease; (ii) [w]ithin 150 feet of any public shellfish fishery or a registered pound net site; (iii) [w]ithin 150 feet of an oyster reserve or any Yates Bar located in an oyster sanctuary; (iv) except under special circumstances, within 150 feet of a federal navigation channel; (v) in any creek, cove, bay, or inlet less than 300 feet wide at its mouth at mean low tide or (vi) in an SAV [(Submerged Aquatic Vegetation)] protection zone.<sup>23</sup>

For submerged land leases in the Atlantic Coastal Bays,<sup>24</sup> these requirements are very similar except for the additional prohibition that the lease may not be located in a setback or buffer from the Assateague Island National Seashore.<sup>25</sup>

As for all water column leases granted in Maryland, the location requirements are almost identical as those for submerged land leases located in the Atlantic Coastal Bays.<sup>26</sup> After a lease application is filed, DNR conducts a thorough review to determine whether all applicable statutory requirements are met.<sup>27</sup> After finishing its review of the application, DNR forwards it to the U.S. Army Corps of Engineers (Army Corps) for its corresponding review according to Nationwide Permit 48 for commercial shellfish aquaculture activities in the waters

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<sup>21</sup> MD. CODE REGS. 08.02.23.03.

<sup>22</sup> MD. CODE ANN., NAT. RES. § 4-11A-09(b).

<sup>23</sup> *Id.* § 4-11A-06(b)(2).

<sup>24</sup> Atlantic Coastal Bays are “the waters of the Assawoman, Isle of Wight, Sinepuxent, Newport, and Chincoteague Bays and their tributaries. *Id.* § 4-11A-01(e).

<sup>25</sup> *Id.* § 4-11A-07(c).

<sup>26</sup> However, a water column lease may be located within 150 feet of a federal navigation channel if it is a water column lease of a riparian owner or a lawful occupant of the riparian property, and the water column lease is located in Herring Creek in St. Mary’s County. *Id.* § 4-11A-08(c).

<sup>27</sup> *Diffendal v. Dep’t of Nat. Res.*, 112 A.3d 1116, 1118 (Md. Ct. Spec. App. 2015).

of the United States.<sup>28</sup> This is a general permit issued nationwide for a term of five years<sup>29</sup> to streamline the authorization of the “discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States necessary for new and continuing commercial shellfish aquaculture operations in authorized project areas.”<sup>30</sup>

If an application for a submerged land or water column lease meets the statutory requirements, DNR must notify the public of the proposed lease. DNR advertises the lease application on its website and in the local newspaper of the county where the lease is going to be located. The agency must also notify the owners of the properties directly in front of the proposed lease, the chair of the local Oyster Committee,<sup>31</sup> and any other parties it deems appropriate.<sup>32</sup> Within thirty days of publication of the last advertisement, “any person who has a specific right, duty, privilege, or interest that is different from that held by the general public and who may be adversely affected by the proposed lease, may file a petition with DNR protesting the issuance of the lease.”<sup>33</sup> In addition, within thirty days of publication of the last advertisement, any person, irrespective of whether or not they have a special interest, can request that DNR hold a public informational meeting on the granting of the lease.<sup>34</sup>

With regard to lease protests, if a protest is filed with DNR by an interested party, it “shall” be heard in accordance with the Maryland

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<sup>28</sup> MD. DEPT. OF NAT. RES., COMMERCIAL SHELLFISH LEASE APPLICATION INSTRUCTIONS 5, <https://dnr.maryland.gov/fisheries/Documents/Shellfish-Lease-Application-Instructions.pdf> (last visited July 23, 2021). Nationwide Permit 48 (NWP 48) was enacted by the Army Corps under the authority of Section 404 of the Clean Water Act (33 U.S.C. § 1344) and Section 10 of the Rivers and Harbors Act (33 U.S.C. § 403). NWP 48 “authorizes the installation of buoys, floats, racks, trays, nets, lines, tubes, containers, and other structures . . . discharges of dredged or fill material into the waters of the U.S. . . . necessary for shellfish seeding, rearing, cultivating, transplanting, and harvesting activities.” U.S. ARMY CORPS OF ENG’RS, NATIONWIDE PERMIT 48 1, <https://www.swf.usace.army.mil/Portals/47/docs/regulatory/Permitting/Nationwide/NWP48TX.pdf> (last visited July 23, 2021).

<sup>29</sup> 33 U.S.C. § 1344(e) (1-2).

<sup>30</sup> U.S. ARMY CORPS OF ENG’RS., *supra* note 28.

<sup>31</sup> The Oyster Committees are statutory bodies present in every tidewater county in Maryland. They are composed of local licensed watermen and oversee advising DNR on oyster propagation activities conducted by DNR in their respective counties. MD. CODE ANN., NAT. RES. § 4-1106(b)(1).

<sup>32</sup> *Id.* § 4-11A-09(g)(1).

<sup>33</sup> *Id.* § 4-11A-09(g)(2)(i).

<sup>34</sup> *Id.* § 4-11A-09(g)(2)(iii).

Administrative Procedure Act (APA).<sup>35</sup> The Office of Administrative Hearings (OAH) is responsible for conducting the hearing when a protest is submitted,<sup>36</sup> and an Administrative Law Judge (ALJ) presides over the hearing. At the hearing, the Office of the Attorney General (OAG) represents DNR.<sup>37</sup> Lease applicants can make an appearance as a separate party if they wish to present their arguments before the ALJ which includes filing motions, offering evidence, calling witnesses, and cross-examining the other parties' witnesses. However, lease applicants do not need to appear as a separate party in order to remain an interested party in the case. The ALJ usually carries out a prehearing conference before the formal hearing.<sup>38</sup> If a party fails to participate in a prehearing conference without justified cause, the ALJ may proceed in the party's absence and issue a default order against it.<sup>39</sup>

During the hearing, each party has the opportunity to offer evidence it wishes to be made part of the record.<sup>40</sup> In the case of lease protests, it is DNR's burden to prove the legality of the proposed lease.<sup>41</sup> To do that, DNR must establish that the proposed lease complies with the statutory requirements.<sup>42</sup> After the conclusion of the hearing, the ALJ issues an order deciding whether the proposed lease should be approved or denied.<sup>43</sup> A person who is aggrieved by the final decision of the ALJ has the right to seek judicial review in the Maryland Court of Special Appeals.<sup>44</sup>

Under the statute, once the application process is complete and DNR is satisfied that the lease meets all of the statutory requirements, DNR "shall" grant the lease.<sup>45</sup> DNR can deny a lease if DNR reasonably concludes that the lease

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<sup>35</sup> *Id.* § 4-11A-09(d)(4)(ii).

<sup>36</sup> DNR delegated the authority to the Office of Administrative hearings to conduct contested case hearings by virtue of MD. CODE ANN., STATE GOV'T. § 10-205.

<sup>37</sup> MD. OFFICE OF THE ATTORNEY GENERAL, BRIEF OVERVIEW OF ATTORNEY GENERAL AGENCIES & DIVISIONS: DEPARTMENT OF NATURAL RESOURCES 10, [https://www.marylandattorneygeneral.gov/Employment%20Documents/Description\\_of\\_Agencies\\_%20Divisions.pdf](https://www.marylandattorneygeneral.gov/Employment%20Documents/Description_of_Agencies_%20Divisions.pdf) (last visited July 23, 2021).

<sup>38</sup> MD. CODE REGS. 28.02.01.17.

<sup>39</sup> *Id.* 28.02.01.23(C).

<sup>40</sup> MD. CODE ANN., STATE GOV'T. § 10-213.

<sup>41</sup> *Historic Sotterley, Inc., v. Md. Dep't. Nat. Res.*, OAH No. DNR-FSA-092-15-33453, p. 17 (Office of Admin. Hearings May 17, 2016) [hereinafter *Historic Sotterley*].

<sup>42</sup> *Id.*

<sup>43</sup> MD. CODE ANN., STATE GOV'T. § 10-221(b)(1).

<sup>44</sup> *Id.* § 10-222 (a)(1).

<sup>45</sup> *Id.*

interferes with public health, safety, or welfare.<sup>46</sup> The finding that the lease would cause such interference needs to be based on substantial evidence present in the administrative record.<sup>47</sup> It would be an abuse of discretion for DNR to deny a lease without substantial evidence of interference.<sup>48</sup>

### III. MARYLAND STANDING REQUIREMENTS

Every claim that is brought before any judicial or administrative court must be justiciable.<sup>49</sup> Justiciability refers to a claim that is appropriate for judicial action.<sup>50</sup> When the case is not justiciable, the courts withhold making a decision because that decision would not have any real-world effect on the parties.<sup>51</sup> One of the requirements for a case to be justiciable is that the parties have standing.<sup>52</sup> Standing refers to the right of a person to “invoke the judicial process in a particular instance.”<sup>53</sup>

Standing in Maryland courts is analyzed using the “cause-of-action” approach.<sup>54</sup> This approach refers to the entitlement or right to invoke a judicial process in a particular instance.<sup>55</sup> For example, an impact on a person’s property interest can be a sufficient basis for standing.<sup>56</sup> In addition, the party’s claim also has to involve a right that is protected or regulated within the zone of interests of a statute or the Maryland Constitution.<sup>57</sup> Lastly, the person with the alleged affected interest must seek to redress his or her injury using the statutory procedure the legislature has established for that particular case.<sup>58</sup>

In the shellfish aquaculture lease application framework, the two main statutory requirements for standing to protest a proposed new lease are to:

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<sup>46</sup> *Id.* § 4-11A-09(d)(4)(i).

<sup>47</sup> *Diffendal v. Dep’t of Nat. Res.*, 112 A.3d 1116, 1126 (Md. Ct. Spec. App. 2015); *see also* *LS Inv. Corp. v. Maryland Dep’t of Nat. Res.*, 2018 WL 1968774, at \*4 (Md. Ct. Spec. App. 2018).

<sup>48</sup> *Id.*

<sup>49</sup> *State Ctr., LLC v. Lexington Charles Ltd. P’ship*, 92 A.3d 400, 427-430 (Md. 2014).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 430 (citing *Reyes v. Prince George’s Cnty.*, 380 A.2d 12, 17 (Md. 1977)).

<sup>54</sup> *Id.* at 429.

<sup>55</sup> *Id.* at 429.

<sup>56</sup> *Id.*; *see also* *Reyes*, 380 A.2d at 17; *Superior Outdoor Signs, Inc. v. Eller Media Co.*, 822 A.2d 478, 491 (Md. Ct. Spec. App. 2003).

<sup>57</sup> *State Ctr.*, 92 A.3d at 429; *see also* *Reyes*, 380 A.2d at 17.

<sup>58</sup> *State Ctr.*, 92 A.3d at 430.

1. File a petition with DNR within 30 days of the publication of the last advertisement; and
2. “[H]ave a specific right, duty, privilege or interest affected by the proposed lease that is different than one shared by the general public.”<sup>59</sup>

The first requirement is straightforward. However, the statute is not clear and Maryland courts have not spoken to the special rights or interests that must be different from ones shared by the general public in this context. The following discussion is an effort to begin and hopefully spark future discussions about the topic of standing for protests to new shellfish aquaculture leases in Maryland.

### B. Property Owner Standing

As mentioned earlier, the statute that regulates shellfish aquaculture in Maryland dictates that the protests shall be heard in accordance with the Maryland APA.<sup>60</sup> When interpreting standing under the APA, the Maryland Court of Appeals has said that the APA “uses the term ‘aggrieved’ to differentiate between those parties before the administrative agency who have a right to judicial review and those parties who do not.”<sup>61</sup> Furthermore, the court has held that “the statutory requirement [in the APA] that a party be ‘aggrieved’ mirrors the general common law standing principles applicable to judicial review of administrative decisions, [t]herefore in order to have standing, a claimant must have a specific interest or property right.”<sup>62</sup> This interest or property right must be “such that he is personally and specifically affected in a way different from that suffered by the public generally.”<sup>63</sup> The specific circumstances of this “special aggrievement” requirement for standing “have been determined by courts on a case by case basis and the decision in each case rests upon the facts and circumstances of the particular case under review.”<sup>64</sup> However, Maryland courts have identified and

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<sup>59</sup> Clark v. Md. Dep’t Nat. Res., OAH No. DNR-FSA-092-14-37186 and DNR-FSA-092-14-37392, at 13 (Office of Admin. Hearings March 23, 2015) [hereinafter Clark Adjudication].

<sup>60</sup> “The protests shall be heard in accordance with the requirements of the Maryland Administrative Procedure Act.” MD. CODE ANN., NAT. RES. § 4-11A-09(g)(2)(ii).

<sup>61</sup> Med. Waste Associates, Inc. v. Maryland Waste Coal., Inc., 612 A.2d 241, n.9 (Md. 1992) (citing Bryniarski v. Montgomery County Bd. of Appeals, 230 A.2d 289, 294 (Md. 1967)).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Bryniarski*, 230 A.2d at 294–95.

expanded on certain guiding principles,<sup>65</sup> particularly in zoning cases, which are the common law basis for the property owner standing doctrine.<sup>66</sup>

In *Bryniarski v. Montgomery County Bd. Of Appeals*,<sup>67</sup> the Court of Appeals makes the first two distinctions regarding the standing analysis under the “special aggrievement” requirement in zoning cases.<sup>68</sup> It noted that when a suit is based on equity, meaning plaintiffs are challenging the constitutionality of a zoning ordinance,<sup>69</sup> plaintiffs have the burden to prove that the ordinance specially aggrieves them in a way that is different from the general public.<sup>70</sup> On the contrary, when the claim is based on an appeal under a zoning ordinance, then the requirement to show special aggrievement depends on the proximity of the property of the claimant to the rezoning activity.<sup>71</sup> Since protests to new shellfish aquaculture leases are based on a process established by statute and because “[a] claimant ordinarily must seek to redress the wrong of which he complains by using the statutory procedure the legislature has established for that kind of case, if it is adequate and available”,<sup>72</sup> this article will only focus on the special aggrievement cases that arise from appeals under zoning statutes. The article will not discuss the case law related to suits seeking to invalidate a zoning statute (equity suits).

In *Bryniarski*, the court divided plaintiffs who appealed a rezoning into two categories. On one side there are the property owners who are *prima facie aggrieved*. On the other side are those whose property is not in close enough proximity to the rezoning activity to be considered *prima facie aggrieved*,<sup>73</sup> but they are close enough to be considered almost *prima facie aggrieved*.<sup>74</sup>

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<sup>65</sup> *Id.*

<sup>66</sup> *State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 92 A.3d 400, 440 (Md. 2014).

<sup>67</sup> *Bryniarski*, 230 A.2d at 294.

<sup>68</sup> *Id.* at 294–95.

<sup>69</sup> *Richmark Realty Co. v. Whittliff*, 173 A.2d 196, 200 (Md. 1961).

<sup>70</sup> *Bryniarski*, 230 A.2d at 294–95.

<sup>71</sup> *Id.*

<sup>72</sup> *State Ctr.*, 92 A.3d at 433 (quoting *Maryland Comm'n on Human Relations v. Mass Transit Admin.*, 294 Md. 225, 231 (1982)).

<sup>73</sup> *Bryniarski*, 230 A.2d at 294–95.

<sup>74</sup> *Ray v. Mayor and City Council of Baltimore*, 59 A.3d 545, 551 (Md. 2013) (citing *Bryniarski*, 230 A.2d at 294); *See also State Ctr.*, 92 A.3d at 445.

*i. Prima facie aggrieved*

A *prima facie* aggrieved property owner is the owner of property that adjoins, confronts, or is near the activity at issue.<sup>75</sup> Because of the owner's proximity to the activity, it is presumed that such a property owner is specially damaged and, thus, a person aggrieved by that activity.<sup>76</sup> When determining whether a person is *prima facie* aggrieved, proximity to the activity is the sole relevant factor.<sup>77</sup> The owners that are adjoining property owners automatically have standing as an aggrieved party without having to prove special aggrievement.<sup>78</sup> Any party challenging that *prima facie* aggrievement exists in a case has the burden to prove otherwise.<sup>79</sup> Because this analysis is only limited to proximity, any alleged factors by the claimants that do not strictly have to do with their property adjoining or confronting the proposed activity are not pertinent to the granting of standing under *prima facie* aggrievement.<sup>80</sup> Still, those factors are pertinent to determining a property owner's special aggrievement in the second category, almost *prima facie* aggrieved.<sup>81</sup>

*ii. Almost prima facie aggrieved*

Property owners need to prove two elements to be considered almost *prima facie* aggrieved: first, that the property nudges up against those belonging to *prima facie* owners; and second, the specific facts or "plus factors" of how their personal interests or property interests have been specially and adversely affected in a way that is different from the general public.<sup>82</sup>

As to the first factor, the types of property owners that fall within this category are owners of property that are not adjoining, confronting, or nearby the activity, but close enough to be considered almost *prima facie* aggrieved.<sup>83</sup> Typically, "this category of almost *prima facie* aggrieved has been found applicable only with respect to protestants who lived 200 to 1,000 feet away from

<sup>75</sup> *Ray*, 59 A.3d at 549-550; *See also State Ctr.*, 92 A.3d at 445.

<sup>76</sup> *Ray*, 59 A.3d at 549-550.

<sup>77</sup> *Id.* at n.6.

<sup>78</sup> *State Ctr.*, 92 A.3d at 446 (*citing Ray*, 59 A.3d at 550 at n.6.); *See also Bryniarski*, 230 A.2d at 294.

<sup>79</sup> 120 W. Fayette St., LLLP v. Mayor and City Council of Baltimore, 964 A.2d 662, 672 (Md. 2009).

<sup>80</sup> *Bryniarski*, 230 A.2d at 294.

<sup>81</sup> *State Ctr.*, 92 A.3d at 446; *See also Ray*, 59 A.3d at 550.

<sup>82</sup> *State Ctr.*, 92 A.3d at 446.

<sup>83</sup> *Id.* at 446.

the subject property.”<sup>84</sup> These types of claimants are not automatically presumed to have standing.<sup>85</sup> Instead, they need to claim that their personal or property rights will be specially and adversely affected.<sup>86</sup> To successfully establish special aggrievement, a property owner must show that the activity affects them in a way which is different from the rest of the general public.<sup>87</sup> That does not mean, however, that the proximity element ceases to be relevant in the standing analysis.<sup>88</sup> Without sufficient proximity, “claims of increasing traffic, change in the character of the neighborhood, . . . [a] change of property value, and even limited visibility . . . have been . . . [deemed to constitute] only general aggrievement[s].”<sup>89</sup>

As to what constitutes the second element, or the ‘plus factors’ as the Court of Appeals called them in *Ray v. Mayor & City Council of Baltimore*,<sup>90</sup> the standard is flexible and applied on a case-by-case basis.<sup>91</sup> When engaging in this analysis, Maryland courts “will examine the specific facts that show aggrievement . . . and compare the injury to the harm suffered by the general public.”<sup>92</sup> The party alleging special aggrievement must prove that they suffered a particular injury to their personal or property rights that is not only different from the one suffered by the general public, but also different from everyone else in the same circumstances.<sup>93</sup>

In *Bell v. Anne Arundel County, Md*<sup>94</sup> the appellants opposed the county’s new rezoning ordinance which reenacted the classifications for 59,045 individual parcels of land located in two districts and changed the zoning classifications of 264 of those parcels.<sup>95</sup> The changes included converting the classifications of parcels from low density residential uses to a more intensive residential classification and turning parcels from residential zones to commercial office

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<sup>84</sup> *Ray*, 59 A.3d at 555.

<sup>85</sup> *Id.*

<sup>86</sup> *Bryniarski*, 230 A.2d at 294; *See also State Ctr.*, 92 A.3d at 445.

<sup>87</sup> *Bell v. Anne Arundel County*, 79 A.3d 976, 989 (Md. Ct. Spec. App 2013), rev’d and remanded, *Anne Arundel County v. Bell*, 113 A.3d 639 (Md. 2015).

<sup>88</sup> *State Ctr.*, 92 A.3d at 449 (citing *Ray*, 59 A.3d at 555).

<sup>89</sup> *Ray*, 59 A.3d at 551.

<sup>90</sup> *Id.*

<sup>91</sup> *Bryniarski*, 230 A.2d at 294.

<sup>92</sup> *Bell*, 79 A.3d at 989, *See also Ray*, 59 A.3d at 549.

<sup>93</sup> *Ray*, 59 A.3d at 545.

<sup>94</sup> *Bell*, 79 A.3d at 989.

<sup>95</sup> *Id.* at 980.

districts.<sup>96</sup> In determining whether the plaintiffs had standing to challenge the rezoning of four of the parcels involved in the ordinance, the Court of Appeals found that the appellants were adjoining property owners to three of the four rezoned parcels and thus *prima facie* aggrieved by the rezoning.<sup>97</sup>

The appellants were not adjoining property owners to the fourth rezoned parcel, but the court determined that their properties were close enough to be considered almost *prima facie* aggrieved.<sup>98</sup> The court examined if the plaintiffs had alleged sufficient ‘plus factors’ that demonstrated the impact or potential impact of the rezoning on “the use enjoyment and value of their properties.”<sup>99</sup> The court also considered whether the appellants had shown that they suffered an injury special to them and different from the one shared with the general public.<sup>100</sup> The appellants had alleged as ‘plus factors’ that the rezoning would cause an increase in traffic, noise from the nearby roads and commercial establishments will interfere with the quiet enjoyment of their properties, a change in the character of their neighborhood, and a decrease in the value of their properties.<sup>101</sup>

The court determined that the only sufficient plus factor was the allegation that the increased noise from the increased traffic and commercial activity would interfere with the quiet enjoyment of their properties.<sup>102</sup> The court distinguished the allegations of the noise caused by increased traffic and commercial activity with the allegations of increased traffic.<sup>103</sup> It stressed that “an allegation of an increase in traffic by itself is insufficient to establish standing”<sup>104</sup> because it does not establish that “plaintiffs had suffered ‘an adverse effect different than that suffered by the public generally’ as required for the purpose of standing.”<sup>105</sup> With regards to the appellants’ allegation of a change in neighborhood character, the court found that the “alleged change in the neighborhood will be suffered by others in the neighborhood”<sup>106</sup> making it insufficient to demonstrate special harm.<sup>107</sup> Finally, to the allegation that the rezoning will decrease the value of their

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 985-86.

<sup>98</sup> *Id.* at 988.

<sup>99</sup> *Id.* at 990 (quoting *DuBay v. Crane*, 240 Md. 180, 183 (1965)).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 991.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 990.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 992-93.

<sup>107</sup> *Id.*

properties, the court determined that the lay opinions of the appellants were insufficient to establish special harm from the loss of property value because they were merely speculating as to what their properties were going to be worth after the development of the area.<sup>108</sup>

### C. Applicability to Protests of Commercial Shellfish Aquaculture Leases

As mentioned earlier, the legislature has not defined, and the Maryland courts and DNR have not interpreted the meaning of the phrase “interest or right that is different from the one shared by the general public” in the context of shellfish aquaculture protests.<sup>109</sup> However, shellfish aquaculture lease protests stem from a procedure established by statute and are governed by the APA.<sup>110</sup> Thus, basic administrative principles relating to standing apply to this process. The Maryland Court of Appeals has found, as quoted earlier, that “the statutory requirement [in the APA] that a party be ‘aggrieved’ mirrors the general common law standing principles applicable to judicial review of administrative decisions.”<sup>111</sup> Furthermore, Maryland courts have analyzed these common law standing principles relating to special aggrievement in property owner standing cases. These cases are pertinent to analyzing whether a protestant to a new shellfish aquaculture lease has standing.

The first step to determine whether a protestant to a new shellfish aquaculture lease will be specially aggrieved is to analyze the proximity of the protestant’s property to the proposed lease site. Similar to property owner standing cases, proximity plays a very important part to determine a lease protestant’s standing.<sup>112</sup> When it designed the aquaculture lease statute Maryland’s General Assembly required DNR to “notify the owners of property directly in front of the proposed activity.”<sup>113</sup> From the plain language of the statute, the General Assembly recognized that those property owners are the most likely to be affected by the approval of the new lease and ensured those property owners were adequately notified. This is what the Maryland Court of Appeals has

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<sup>108</sup> *Id.* at 992.

<sup>109</sup> MD. CODE ANN., NAT. RES. § 4-11A-09(g)(2)(i).

<sup>110</sup> *Id.* § 4-11A-09(g)(2)(ii).

<sup>111</sup> *Med. Waste Associates, Inc. v. Maryland Waste Coal., Inc.*, 612 A.2d 241, n.9 (Md. 1992) (citing *Bryniarski v. Montgomery County Bd. of Appeals*, 230 A.2d 289, 294 (Md. 1967)).

<sup>112</sup> *Clark Adjudication*, *supra* note 59, at 15.

<sup>113</sup> MD. CODE ANN., NAT. RES. § 4-11A-09(g)(1)(ii)(2).

considered *prima facie* aggrieved property owners.<sup>114</sup> Therefore, it can reasonably be concluded that the property owners that live directly in front of the proposed aquaculture lease “automatically have standing”<sup>115</sup> to present a protest to it. They do not have to show that they will be specially aggrieved by the proposed lease because it is understood that due to their property’s location they will be impacted “in a way that is different from the general public” as the statute requires.<sup>116</sup>

The analysis gets tougher when determining the standing of other protestants that do not own property directly in front of the proposed lease. In this case, property owners will not be considered to automatically have standing and have to show that the proposed lease will affect them in a way different from the general public.<sup>117</sup> Due to a lack of guidance by the legislature, DNR, and Maryland courts as to the practical meaning of this phrase, we have to refer back to the common law “special aggrievement” principles encompassed in the APA.<sup>118</sup> In property owner standing cases, the Maryland courts created a two-tiered test to determine special aggrievement in property owners that are not adjoining or confronting the activity they oppose: (1) whether the property of those claimants is sufficiently close to the *prima facie* aggrieved properties to be considered almost *prima facie* aggrieved;<sup>119</sup> and (2) whether the claimants allege that there are sufficient ‘plus factors’ that show that they have an affected personal or property right interest that is different from the one shared by the general public.<sup>120</sup> As it will be demonstrated from the *Clark* adjudication discussed below, the proximity requirement is less defined and interpreted more loosely in aquaculture lease protests than in the property owner standing cases.

The *Clark* adjudication involved multiple protestants and multiple protests to three proposed aquaculture leases (Leases A, B, and C)<sup>121</sup> in the St. Mary’s River Oyster sanctuary.<sup>122</sup> DNR submitted a motion to dismiss all of the protests for lack of standing or, in the alternative, a motion for a summary decision for all

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<sup>114</sup> Ray v. Mayor and City Council of Baltimore, 59 A.3d 545, 550 (Md. 2013) (citing *Bryniarski*, 230 A.2d at 294).

<sup>115</sup> *Id.* at 549.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 555.

<sup>118</sup> *Med. Waste Associates, Inc.*, 327 Md. at n.9.

<sup>119</sup> *Id.*

<sup>120</sup> *Ray*, 59 A.3d at 551.

<sup>121</sup> The names of the applicants of the leases and the names of the protestants are concealed to protect the parties’ identities.

<sup>122</sup> *Clark* Adjudication, *supra* note 59, at 1.

of the protests.<sup>123</sup> Specifically, DNR asserted that two of the protestants filed their petition to protest after the thirty-day statutory window closed<sup>124</sup> and that the protestants who did timely file failed to assert a right, duty, privilege or interest different from the one shared with the general public.<sup>125</sup> The protestants who submitted the petitions to protest Leases B and C after the thirty-day window asserted in their opposition that they were going to be directly affected by the leases because their properties abutted the area where the proposed leases were going to be located.<sup>126</sup> Also, they claimed that they had participated in the public meetings and that the thirty-day requirement should have been interpreted flexibly because the filing of the protest was one day late.<sup>127</sup> Finding all the facts of this case to be undisputed and supporting a ruling on the pleadings presented in DNR's motion, the ALJ ultimately granted the motion to dismiss on the basis that the two protestors did not have standing because they failed to timely file the petition to protest the lease.<sup>128</sup>

The ALJ treated the motion related to the remaining parties as a motion for summary judgment.<sup>129</sup> In its motion, DNR argued that none of those protestants "owned property in front of, adjacent to, or near the proposed leases"<sup>130</sup> and hence were no different from members of the general public who use the river for recreation, fishing, and crabbing.<sup>131</sup> DNR also claimed that the protestant's assertions were too vague to establish that a unique interest would be affected by the approval of the lease.<sup>132</sup> The protestants argued that DNR's motion should be denied because the lease would cause a real interference with enjoyment of their properties and impact their ability to engage in boating, fishing, crabbing and swimming in the river,<sup>133</sup> uses which are derived from rights recognized by Maryland common law to riparian property owners.<sup>134</sup>

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<sup>123</sup> *Id.* at 9.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Clark Adjudication, *supra* note 59, at 11.

<sup>128</sup> *Id.* at 12.

<sup>129</sup> Because the ALJ considered the exhibits that were attached to DNR's motion, the decision regarding the other protestants had to be treated as a motion for summary decision. *See id.* at 10.

<sup>130</sup> *Id.* at 13.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> The Courts of Appeals of Maryland has recognized the following riparian rights: right to access to and from the navigable parts of the river in front of their property, right to accretion, and the right to extend and improve out to the limits prescribed when granted by statute. *Causey v. Gray*, 243 A.2d 575, 581 (Md. 1968).

With respect to this group of protestants, the ALJ decided that they had standing to protest Leases B and C, but not Lease A. The ALJ concluded that the protestants had standing to protest the approval of Leases B and C because “[a]s individuals who own properties in the immediate area of [the leases] and who allege that their enjoyment of their properties may be affected, the protestants are entitled to an opportunity to challenge [the] leases.”<sup>135</sup> The ALJ also added that “[w]aterfront property owners near [the leases] are more likely to regularly use the river and the land abutting the river for recreation and navigation than the general public.”<sup>136</sup>

With regard to Lease A, the ALJ asserted that the protestors did not have standing because the lease was very remote from their properties.<sup>137</sup> The deciding factor for the ALJ’s analysis was that the protestants would not have been required to pass “anywhere near” that area of the river to enjoy navigation, swimming, birdwatching, or crabbing, so their interests were not different from those shared by the general public.<sup>138</sup> While the ALJ acknowledged that although the standing requirements for administrative proceedings are not strict, the protestants do need to meet the minimum statutory standards.<sup>139</sup>

In the *Clark* adjudication the OAH engages in its version of the two-pronged test to determine if the protestants are specially aggrieved and thus have standing to protest Leases A, B and C. First, when analyzing the proximity element of the test, the OAH granted standing to the protestants that owned properties in the “immediate area”<sup>140</sup> of Leases B and C. Here the court found that the proximity of the protestants was enough to comply with the first part of the test even though their properties were not strictly 200 to 1,000 feet away from the owners of property directly in front of the lease (i.e., the *prima facie* aggrieved owners) as required in the property owner standing cases.<sup>141</sup> Second, for the allegation of the ‘plus factors’ that showed that Leases B and C would specially

<sup>135</sup> Clark Adjudication, *supra* note 59, at 15.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 14.

<sup>138</sup> *Id.*

<sup>139</sup> “Under section 4-11A-09(g)(2) of the Natural Resources Article, a person may participate as a party in an aquaculture lease protest case if the person (1) files a petition with the Department within 30 days of publication of the last newspaper advertisement; and (2) has ‘a specific right, duty, privilege, or interest that is different from that held by the general public and may be adversely affected by the proposed lease.’” *Id.* at 13.

<sup>140</sup> *Id.* at 15.

<sup>141</sup> Ray v. Mayor and City Council of Baltimore, 59 A.3d 545, 551 (Md. 2013).

aggrieve them in a way different from the general public, the court found sufficient the protestant's allegations that the leases may affect their enjoyment of their properties.<sup>142</sup> With regards to Lease A, because protestants failed to demonstrate that they had sufficient proximity to the area, the OAH determined they did not have standing to protest that lease.

Lastly, the example of the standing analysis made by the OAH in the *Clark* case could be applied in other instances. For example, if a protestant merely raises concerns about the impact of a proposed lease to the wildlife of the area that will impair their ability to fish or birdwatch, without showing that they own property in the "immediate area" where the proposed lease is going to be located, the OAH is likely to consider this an interest that the protestant shares with the general public and hence conclude that the protestant lacks standing. In contrast, if that same protestant shows that they own property in the "immediate area" of the proposed lease and may pass through the area where the proposed lease is going to be located to enjoy birdwatching, crabbing, hunting, or fishing, the protestant probably has standing.

This concrete example should also apply when analyzing the standing of local watermen who, as mentioned earlier, have historically protested the approval of new shellfish aquaculture leases.<sup>143</sup> Watermen who own property "directly in front" of where the lease is going to be located will be considered *prima facie* aggrieved and thus have standing to protest. Other watermen who also have standing are those who own property in the "immediate area" of where the lease will be located, and who claim that the new lease will specially affect them (e.g., impairing wild oyster harvest or crabbing activities). Consequently, if the watermen who protest are unable to show that they own property in the "immediate area" of where the new lease is to be located, claims that the lease is going to interfere with wild oyster harvesting or crabbing will most likely be considered by the OAH as general grievances shared by the rest of the citizens who engage in wild oyster harvesting and crabbing.

#### **IV. Aquaculture Leasing and Public Participation in Washington and Texas**

States have a diversity of approaches to shellfish aquaculture leasing, including how they handle public participation in the process. This section

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<sup>142</sup> Clark Adjudication, *supra* note 59, at 15.

<sup>143</sup> Webster, *supra* note 8, at 4.

examines the public participation process for new commercial shellfish aquaculture leases in Texas and Washington. Washington and Texas are on both ends of the spectrum with regard to aquaculture production in the U.S. Shellfish harvesting has been an important part of Washington's economy for centuries, and aquaculture in Washington has been regulated since at least 1861.<sup>144</sup> Texas, however, has just recently enacted a statute renewing its program to issue new oyster aquaculture leases after a 30-year moratorium.<sup>145</sup>

After comparing Maryland, Texas, and Washington's public participation frameworks regarding shellfish aquaculture leasing and permitting, this author concludes that Maryland should adopt a public participation process similar to Texas. In order to streamline Maryland's public participation in shellfish aquaculture leasing, the statute should be amended to eliminate protests and institute a simple notice and comment procedure instead. Different from protests, submitting comments to DNR does not trigger an adjudication procedure. Instead, the comments would be addressed by DNR, the agency with the expertise to resolve controversies around shellfish aquaculture leasing.

#### A. Washington

Shellfish have been an important food source for Pacific Northwest inhabitants for thousands of years.<sup>146</sup> The abundance of shellfish in the area made it a valuable commodity not only for coastal Native American Tribes, who relied on shellfish harvesting for their subsistence and for ceremonial reasons, but also for early settlers on the West Coast.<sup>147</sup> The competition for the harvest of shellfish brought tension between early European settlers and the Tribes.<sup>148</sup> The Stevens

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<sup>144</sup> *Washington Coast Shellfish Aquaculture Timeline*, SEA GRANT WASH., <https://wsg.washington.edu/aquaculture-timeline/> (last visited July 23, 2021).

<sup>145</sup> OFFICE OF THE STATE AUDITOR, A JOINT STUDY REPORT ON THE PARKS AND WILDLIFE DEPARTMENT'S COMMERCIAL FISHERY PROGRAMS AND THE GENERAL LAND OFFICE'S LEASES OF STATE-OWNED LANDS, REPORT NO. 01-11, 1 (2000), [https://sao.texas.gov/reports/main/01-011\\_General.pdf](https://sao.texas.gov/reports/main/01-011_General.pdf).

<sup>146</sup> DERRICK TOBA, SMALL-SCALE OYSTER FARMING FOR PLEASURE AND PROFIT IN WASHINGTON 1 (2002), <https://nsgl.gso.uri.edu/washu/washuh04002.pdf>; *Aquaculture*, WASH. ST. DEP'T OF NAT. RES., <https://www.dnr.wa.gov/programs-and-services/aquatics/shellfish/aquaculture>.

<sup>147</sup> *Id.*

<sup>148</sup> RAYE EVRAD, WASHINGTON SHELLFISH AQUACULTURE: ASSESSMENT OF CURRENT REGULATORY FRAMEWORKS 11 (2017), [https://digital.lib.washington.edu/researchworks/bitstream/handle/1773/38654/Evrard\\_washington\\_02500\\_16923.pdf?sequence=1&isAllowed=y](https://digital.lib.washington.edu/researchworks/bitstream/handle/1773/38654/Evrard_washington_02500_16923.pdf?sequence=1&isAllowed=y).

Treaties were adopted between 1854 and 1855 to ease those tensions.<sup>149</sup> The treaties guaranteed that in return for ceding great portions of their land, certain Tribes would have a continued right to fish and hunt in their usual and accustomed places.<sup>150</sup> During this period, there was a significant decline in shellfish and in 1861 Washington State enacted “an Act to Encourage the Cultivation of Oysters.”<sup>151</sup> This Act granted citizens who had planted or were planning to plant oysters in areas where no oyster beds existed an exclusive right to use an area of up to ten acres to plant oysters.<sup>152</sup> Then, in 1895, the State legislature enacted the Bush Act<sup>153</sup> and the Callow Act.<sup>154</sup> Both laws allowed the sale of state aquatic lands to private owners on the explicit condition that most of the land be dedicated to the cultivation of shellfish.<sup>155</sup> However, these laws also led to significant conflict with local Native American Tribes after the best submerged lands for oyster harvesting and fishing were sold to private, non-Native American owners.<sup>156</sup> The Bush Act and the Callow Act are no longer in effect, but their legacies are that there are still submerged lands that are owned by private parties.<sup>157</sup>

Washington is currently the leading producer of farm-raised shellfish in the United States.<sup>158</sup> Although many types of shellfish are grown in the state,<sup>159</sup> the most predominant is oyster aquaculture.<sup>160</sup> Similar to Maryland, the agency responsible for approving shellfish aquaculture leases on state-owned aquatic lands<sup>161</sup> in Washington is Washington’s Department of Natural Resources (WA DNR). State-owned aquatic lands are defined as “lands that lie beneath the State’s

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Washington Coast Shellfish Aquaculture Timeline*, *supra* note 144.

<sup>152</sup> *Id.*

<sup>153</sup> REM. REV. STAT. § 8040 *et seq.* repealed by An Act relating to oyster lands and repealing chapters XXIV (24) and XXV (25) of the Laws of 1895 ch.47, §1 (1935).

<sup>154</sup> *Id.*

<sup>155</sup> EVRAD, *supra* note 148, at 13.

<sup>156</sup> *Id.*

<sup>157</sup> WASH. REV. CODE ANN. § 79.135.010.

<sup>158</sup> *Shellfish in Washington*, SEA GRANT WASH., <https://wsg.washington.edu/our-northwest/shellfish/> (last visited July 23, 2021).

<sup>159</sup> Shellfish aquaculture or shellfish farming includes cultivating or harvesting shellfish on tidelands [and] cultivating shellfish on floating rafts (water column). *Aquaculture*, *supra* note 146.

<sup>160</sup> Toba, *supra* note 146, at 2.

<sup>161</sup> As noted, there are still submerged lands in the state of Washington that are owned by private parties that also are leased for shellfish aquaculture. For the purpose of this comparative analysis, the article will focus on the leasing of aquatic lands that are owned by the state of Washington. WASH. REV. CODE ANN. § 79.135.010.

water and include the coast, bedlands, lakes, rivers and Puget Sound marine areas”<sup>162</sup>

When granting a lease to state-owned aquatic lands, WA DNR merely acts as a landlord on behalf of the state.<sup>163</sup> By law, the department is obligated to manage the State’s aquatic lands for the benefit of the public and to “safeguard public recreation, shoreline access, environmental protection, and other public benefits associated with the aquatic lands of the state.”<sup>164</sup> Thus, WA DNR’s review of lease application materials needs to be thorough. Lease applicants must submit a written application, a map and a description of the lands to be leased, and a \$25 deposit.<sup>165</sup> Currently, for an individual or business to obtain a shellfish aquaculture lease, they must also complete a Joint Aquatic Resources Permit Application (JARPA) and Aquatic Use Authorization on the Department of Natural Resources Managed Aquatic Lands (known as “Attachment E”).<sup>166</sup> In some counties, before submitting a JARPA, an applicant is required to attend a pre-submission conference with the county officials.<sup>167</sup>

Original, signed JARPA and Attachment E applications are submitted to the federal, state, tribal, and local agencies that accept JARPA for parallel evaluations focused on different concerns.<sup>168</sup> The agencies that issue permits under JARPA are: counties; WA DNR; the Washington Department of the Ecology (WA Department of Ecology) and the Army Corps. The Army Corps typically issues their corresponding permit under NWP 48 or an individual permit (IP).<sup>169</sup> Following a June 2020 court order from the District Court for the Western District of Washington, which vacated the current NWP 48 in

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<sup>162</sup> WASH. ST. DEP’T OF NAT. RES., LEASING STATE OWNED AQUATIC LANDS 2, [https://www.dnr.wa.gov/publications/em\\_fs11\\_019\\_leasing\\_soal\\_0216.pdf](https://www.dnr.wa.gov/publications/em_fs11_019_leasing_soal_0216.pdf) (last visited July 20, 2021).

<sup>163</sup> *Id.*

<sup>164</sup> WASH. REV. CODE ANN. § 79.105.010.

<sup>165</sup> *Id.* § 79.135.120. *See also* WASH. ST. DEP’T OF ECOL., SUPPLEMENTAL NARRATIVE FOR EXISTING PERMITTING PROCESSES FLOWCHART 6-7, <https://ecology.wa.gov/DOE/files/ed/eda385e6-47c6-40b4-bc24-01bc6a4a972c.pdf> (last visited July 23, 2021).

<sup>166</sup> WASH. ST. DEP’T OF NAT. RES., *supra* note 162, at 2.

<sup>167</sup> WASH. ST. DEP’T OF ECOL., *supra* note 165, at 5.

<sup>168</sup> WASH. ST. DEP’T OF ECOL., PRIMARY REQUIREMENTS TO GROW AND HARVEST SHELLFISH IN WASHINGTON STATE, <https://ecology.wa.gov/DOE/files/78/78fc7d5a-c802-4191-86a1-5032c804851a.pdf> (last visited July 23, 2021.)

<sup>169</sup> *Id.*

Washington,<sup>170</sup> the Army Corps is at the time of publication of this article only issuing IPs for aquaculture operations in Washington.<sup>171</sup> Applicants also need to submit IP applications to the corresponding Tribes, the WA Department of Health, and the WA Department of Fish and Wildlife.<sup>172</sup>

For a lease of state-owned aquatic lands to be approved, all the agencies need to issue the corresponding permits, but the actual lease contract is granted by the WA DNR. During the JARPA review and permitting process, WA DNR will contact the lease applicant to discuss the proposed lease project, request additional information, suggest modifications, and suggest options to minimize the harm to the environment.<sup>173</sup> WA DNR will also contact the other permitting agencies. After the department conducts its initial evaluation, it can pre-approve or deny a lease authorization application.<sup>174</sup> If pre-approved by WA DNR, the applicant can move forward with the applications for the other required permits.<sup>175</sup> If all the other required permits are approved, WA DNR will issue the lease.<sup>176</sup> In Washington, the parameters of each lease authorization vary depending where the lease is located,<sup>177</sup> and the lease terms are developed by the WA DNR in consultation with the lease applicant.<sup>178</sup>

The county where the lease will be located is in charge of issuing a Shoreline Substantial Development and Conditional Use permit.<sup>179</sup> Counties

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<sup>170</sup> *Coal. to Protect Puget Sound Habitat v. U.S. Army Corps. of Eng'rs*, 466 F. Supp. 3d 1217 (W.D. Wash. 2020) (appeal dismissed); *Ctr. for Food Safety v. U.S. Army Corps of Eng'rs*, 2020 WL 6572481 (2020) (appeal dismissed); *Coal. to Protect Puget Sound Habitat v. U.S. Army Corps of Eng'rs* 2020 WL 6576097 (2020) (affirmed); *Coal. to Protect Puget Sound Habitat v. U.S. Army Corps of Eng'rs*, 843 Fed. Appx. 77 (9th Cir. 2021).

<sup>171</sup> *Shellfish Aquaculture*, U.S. ARMY CORPS OF ENG'RS., <https://www.nws.usace.army.mil/Missions/Civil-Works/Regulatory/Shellfish-Aquaculture/> (last visited July 23, 2021). Individual permits are permits issued by the Army Corps under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act to authorize work and the discharge of dredge and fill material in the navigable waters of the U.S. The authorization of these permits is not streamlined like NWP 48, and they are issued individually to each permit applicant. *Obtain a Permit*, U.S. ARMY CORPS OF ENG'RS, <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Obtain-a-Permit/> (last visited July 23, 2021).

<sup>172</sup> WASH. ST. DEP'T OF ECOL., *supra* note 165, at 1-2.

<sup>173</sup> WASH. ST. DEP'T OF NAT. RES., *supra* note 162, at 2.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> WASH. REV. CODE ANN. §79.135.100.

<sup>178</sup> WASH. ST. DEP'T OF NAT. RES., *supra* note 162, at 2.

<sup>179</sup> WASH. ST. DEP'T OF ECOL., *supra* note 168, at 1.

review the JARPA application for completeness, and some counties conduct a thorough review of the supporting materials.<sup>180</sup> If the application is not complete, it will be returned to the applicant.<sup>181</sup> If the application is complete, the county will issue a “notice of application” to the public; Tribes; and federal, state and local agencies requesting comments.<sup>182</sup> The comment period lasts from fourteen to thirty days, depending on the county.<sup>183</sup> After the comment period ends, concerns of interested parties are addressed by the county.<sup>184</sup> Before issuing the Shoreline Substantial Development and Conditional Use permit, counties review the potential environmental impacts of the proposed activity and issue a threshold determination under the State Environmental Policy Act (SEPA).<sup>185</sup> Counties may also provide notice to tribes, agencies, and neighbors after the SEPA threshold determination is complete.<sup>186</sup> The determination can be appealed in conformity with the appeals process established in each county.<sup>187</sup>

The WA Department of Ecology and the Army Corps work together throughout the JARPA process.<sup>188</sup> When the Army Corps is in the process of reviewing an IP application, the Department of Ecology and the Army Corps issue a Joint Public Notice with thirty days for public comment and notify Tribes regarding the impact to natural and cultural resources.<sup>189</sup> In addition to the thorough review by these agencies, the other state agencies involved in the JARPA and other permitting processes review the application and grant the

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<sup>180</sup> WASH. ST. DEP’T OF ECOL., *supra* note 165, at 2-3.

<sup>181</sup> *Id.*

<sup>182</sup> The notice of application to federal, state, and local agencies is for submission of their comments only, this is not the start of a permit application. *Id.*

<sup>183</sup> *Id.* at 3.

<sup>184</sup> *Id.* at 4.

<sup>185</sup> *Id.* That threshold determination could be: Determination of Significance (project will cause significant impacts and activity will require an Environmental Impact Statement); Mitigated Determination of Non-Significance (some significant impacts identified and applicant needs to mitigate those impacts before the county can issue the permit); or Determination of Non-Significance (project will not cause significant environmental impacts and meets all the necessary requirements of the county code thus permit can be issued). *Lead Agency Determination and Responsibilities*, WASH. ST. DEP’T OF ECOL., <https://ecology.wa.gov/Regulations-Permits/SEPA/Environmental-review/SEPA-guidance/Guide-for-lead-agencies/Lead-agency-determination-and-responsibilities> (last visited July 23, 2021).

<sup>186</sup> WASH. ST. DEP’T OF ECOL., *supra* note 165, at 4-5.

<sup>187</sup> WASH. REV. CODE ANN. § 43.21C.075. The decision on the appeal is subject to judicial review. *Id.* §43.21C.075(6).

<sup>188</sup> WASH. ST. DEP’T OF ECOL., *supra* note 165, at 7-8.

<sup>189</sup> *Id.* The public notification requirements in the NWP 48 permitting process varies significantly from the individual permitting process. *See id.*

corresponding permits. Appeals by interested parties to any of the permits issued in this process are done following the procedure established by the local, state, and federal agencies in charge of issuing the permit appeal.<sup>190</sup>

In Washington, notice to local Native American Tribes is a crucial aspect of the permitting process.<sup>191</sup> Because of existing treaty rights and a Settlement Agreement in 2007,<sup>192</sup> Washington Tribes have reserved rights to take 50% of all harvestable wild shellfish stock from their usual and accustomed areas.<sup>193</sup> Farmed shellfish generally are exempt from the 50% requirement, but if the oysters are grown on naturally occurring oyster bottoms, the grower is responsible for allocating 50% of the harvest to the Tribes with rights to that area.<sup>194</sup> To ensure that Tribes are able to exercise these harvesting rights, the Army Corps and the county governments notify the relevant Native American Tribes during the permitting process.<sup>195</sup> If any parcel of land in the application was not part of the 2007 Settlement Agreement, the applicant is required to notify the corresponding Tribes by filling out the “Tribal Section 6.3” form.<sup>196</sup> After submitting this form, the Tribes will evaluate and determine whether they have an interest under treaty rights in the area.<sup>197</sup> If they determine they have an interest, the leaseholder will work with the Tribes to issue a Harvest Management Plan.<sup>198</sup>

Washington’s shellfish aquaculture leasing and permitting framework is very different from Maryland’s. Consequently, general public involvement in the leasing process is also very different. In Washington, various local, state, federal, and Tribal bodies are separately notified and, in most cases, intricately involved in the permitting process. Further, WA DNR does not hold a separate notice and comment period to issue a state-owned aquatic land lease.<sup>199</sup> This is probably due

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<sup>190</sup> *Id.* at 4-5.

<sup>191</sup> *Id.* at 7-8.

<sup>192</sup> Joint Motion for Order and Consent Decree Approving Settlement Agreement, U.S. v. Wash., 20 F. Supp. 3d 828 (W.D. Wash. 2007), <https://www.wawd.uscourts.gov/sites/wawd/files/MotionandSettlementAgreement14476.pdf> (July 23, 2021).

<sup>193</sup> *Id.*

<sup>194</sup> EVRAD, *supra* note 148, at 14.

<sup>195</sup> WASH. ST. DEP’T OF ECOL., *supra* note 165, at 3 and 9-10.

<sup>196</sup> *Id.* at 1.

<sup>197</sup> *Id.* at 1-2.

<sup>198</sup> *Id.* at 2.

<sup>199</sup> WASH. ST. DEP’T OF NAT. RES., *supra* note 162, at 1-2.

to the fact that WA DNR issues the final lease contract only after the applicant obtains all the other necessary permits.<sup>200</sup>

The public participation opportunities in the shellfish aquaculture leasing and permitting process in Washington are threefold. First, the county government where the lease will be located publishes a “notice of application” requesting public comments from the public, Tribes, federal, state, and local agencies.<sup>201</sup> Each county regulates the public comment period which lasts from fourteen to thirty days, depending on the county.<sup>202</sup> After the comments are submitted, the county addresses them in the final authorization of its permit.<sup>203</sup> When the local governments conclude the SEPA threshold review, the county government notifies federal, state, and local agencies.<sup>204</sup> They also notify members of the public who request to be notified.<sup>205</sup> Members of the public can appeal this threshold determination in conformity with the appeals process established in each county.<sup>206</sup>

Second, when issuing an individual permit, the Army Corps and WA Department of Ecology conduct a thirty-day notice and public comment period.<sup>207</sup> Third, local Tribes are notified by the county government and the Army Corps and afforded a right to comment in the local government permitting process.<sup>208</sup> In addition, if the state-owned aquatic lands that are to be leased are not part of the 2007 Settlement agreement,<sup>209</sup> applicants need to notify the Tribes of the area to determine if they have treaty harvesting rights in the area and develop the corresponding shellfish harvesting management plan.<sup>210</sup> The Tribes’ approval of the project is a crucial step of the process to safeguard treaty rights.<sup>211</sup>

Maryland’s leasing process is streamlined and does not directly depend on permit approvals by other state or local agencies other than DNR.<sup>212</sup> The Army

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<sup>200</sup> *Id.* at 2.

<sup>201</sup> WASH. ST. DEP’T OF ECOL., *supra* note 165, at 2.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 2-3.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 9.

<sup>208</sup> *Id.* at 2 and 9.

<sup>209</sup> *Id.* at 4-5.

<sup>210</sup> *Id.* at 1-2.

<sup>211</sup> *Id.*

<sup>212</sup> MD. CODE ANN., NAT. RES. § 4-11A-04(c).

Corps works very closely with Maryland's DNR when issuing the NWP 48 or the corresponding individual permit, and it issues a separate notice and comment period, but that process is completely separate from lease protests, which are state procedures.<sup>213</sup> While Maryland's public participation process is streamlined, lease protests trigger an administrative adjudication process that is very different from typical agency notice and comment periods - this is why standing to present a protest is very important. In Washington's public participation process, however, any person, whether it is a person who will be specially aggrieved by oyster aquaculture activities or not, is able to submit comments during each local agency's permitting review.

### B. Texas

Oyster leasing began in Texas in 1891 when the state legislature began leasing bay bottoms to fishermen for oyster production.<sup>214</sup> The original purpose of this program was to create new self-sustaining areas for healthy oyster production year round.<sup>215</sup> Leaseholders removed wild oysters from polluted areas to reduce the possibility of the harvesting of oysters that could threaten public health.<sup>216</sup> Later the state conferred the administration of these oyster leases to the Texas Parks and Wildlife Department (TPWD).<sup>217</sup> Parties who were interested in the cultivation of oysters on private leases needed a shellfish culture license from TPWD.<sup>218</sup> Licensed culturists could also take "reasonable quantities of brood stock from public waters."<sup>219</sup> By 1988, the program was not very successful, leading TPWD to determine that the "revenues from the oyster lease program are far less than the cost of program administration,"<sup>220</sup> and in 1989 the state imposed a moratorium on new private oyster leases.<sup>221</sup> As a result, the existing leases became very valuable and created a closed market around the purchasing of oyster

<sup>213</sup> MD. DEPT. OF NAT. RES., *supra* note 28, at 5.

<sup>214</sup> TEX. PARKS & WILD. DEP'T., TEXAS OYSTER FISHERY MANAGEMENT PLAN 44 (1988), [https://www.researchgate.net/publication/260038756\\_Texas\\_oyster\\_fishery\\_management\\_plan](https://www.researchgate.net/publication/260038756_Texas_oyster_fishery_management_plan).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> OFFICE OF THE STATE AUDITOR, *supra* note 145, at 1.

<sup>218</sup> OFFICE OF THE STATE AUDITOR, A JOINT STUDY REPORT ON THE PARKS AND WILDLIFE DEPARTMENT'S COMMERCIAL FISHERY PROGRAMS AND THE GENERAL LAND OFFICE'S LEASES OF STATE-OWNED LANDS, APPENDICES 37, 95 (2000), [https://sao.texas.gov/reports/main/01-011\\_Appendix.pdf](https://sao.texas.gov/reports/main/01-011_Appendix.pdf) [hereinafter Appendix].

<sup>219</sup> TEX. PARKS & WILD. DEP'T., *supra* note 214, at 44.

<sup>220</sup> *Id.*

<sup>221</sup> APPENDIX, *supra* note 218.

leases through private transactions.<sup>222</sup> Prices soared to an average of a thousand dollars per acre or more.<sup>223</sup> In addition, TPWD did not exercise control over these transactions and could not benefit from them.<sup>224</sup> Up until recently, oyster aquaculture and leasing in the state of Texas was controlled by only a few hands.<sup>225</sup>

In 2019, however, the state passed a statute re-establishing a permitting framework for commercial oyster aquaculture and leasing, known in the state as oyster mariculture.<sup>226</sup> TPWD adopted regulations for the program in August 2020.<sup>227</sup> Texas lacks a multi-agency joint application similar to the ones that exist in Maryland and Washington. Thus, the process to apply for a lease and permits to engage in oyster aquaculture under this new framework involves multiple permits issued separately by different agencies.

The first step in the Texas permitting process is to apply for a Cultivated Oyster Mariculture Permit (COMP).<sup>228</sup> This permit is issued by TPWD.<sup>229</sup> In order to apply for the COMP, the applicant needs to submit their operation plan, natural resources survey, and personal information.<sup>230</sup> The operation plan describes the details of the operation, including site location and layout, type of gear to be used, seed source, and operational details.<sup>231</sup> The natural resources survey requirements relate to the verification that the proposed permit area does not contain sensitive habitats.<sup>232</sup> Once this information is submitted, TPWD evaluates and issues a conditional COMP.<sup>233</sup> Obtaining a Final COMP is contingent upon obtaining the corresponding permits, leases, and authorizations from the corresponding state and federal agencies such as the Army Corps, Texas

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<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> Gwendolyn Knapp, *The Texas Oyster Industry Is Now a Shell of Its Former Self*, HOUSTONIA: NEWS, (Apr. 24, 2018, 12:00 am), <https://www.houstoniamag.com/eat-and-drink/2018/04/texas-oyster-industry>.

<sup>226</sup> TEX. PARKS & WILD. CODE ANN. §75.

<sup>227</sup> *Id.*

<sup>228</sup> 31 TEX. ADMIN. CODE § 58.353(b).

<sup>229</sup> *Id.*

<sup>230</sup> TEX. PARKS & WILD. DEP'T, TEXAS CULTIVATED OYSTER MARICULTURE PERMIT 1, [https://tpwd.texas.gov/fishboat/fish/commercial/com\\_cf/com\\_index.phtml](https://tpwd.texas.gov/fishboat/fish/commercial/com_cf/com_index.phtml) (last visited July 23, 2021).

<sup>231</sup> *Id.* at 6

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 7.

Commission on Environmental Quality, Texas Department of State Health Services, and Texas Department of Agriculture.<sup>234</sup>

If the oyster operation is going to be located on state owned aquatic lands, the applicant needs to apply for, and obtain, either a lease or an easement from the Texas General Land Office (GLO).<sup>235</sup> Commercial coastal easements are issued “for commercial projects on coastal public land when the applicant has ownership interest in the adjacent uplands.”<sup>236</sup> Commercial leases are issued for commercial shellfish aquaculture on state-owned land when the applicant does not have ownership interests upland.<sup>237</sup> For the purpose of this comparative analysis, the article focuses on commercial leases for oyster aquaculture.

Before a final COMP may be issued by TPWD, a commercial lease needs to be obtained from the GLO.<sup>238</sup> The lease application requires the submission of detailed maps of the area and the type of aquaculture project that is going to take place.<sup>239</sup> After the application is submitted, the GLO will review the materials and approve or deny in writing the request for a lease.<sup>240</sup> If the request is approved, the GLO will execute the lease.<sup>241</sup> After the lease is issued along with any other required permits and authorizations, the COMP applicant submits that documentation to TPWD.<sup>242</sup> TPWD then reviews the documentation to determine whether it will issue the final COMP.<sup>243</sup>

During the review process in the final COMP, TPWD “will publish the notice of application for permit . . . and provide the opportunity for public comment.”<sup>244</sup> Also, if the facilities are going to be partially or wholly in public waters, like in the case of a submerged land lease in state-owned coastal land, TPWD “will hold a public meeting in the city or municipality closest to the

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<sup>234</sup> *Id.*

<sup>235</sup> TEX. NAT. RES. CODE ANN. § 33.101 *et seq.*; TEX. NAT. RES. CODE ANN. § 51.121 *et seq.*; *Coastal Leasing and Easements*, TEXAS GENERAL LAND OFFICE, <https://www.glo.texas.gov/coast/coastal-management/leasing-easements/index.html> (last visited July 23, 2021).

<sup>236</sup> TEXAS GENERAL LAND OFFICE, *supra* note 235.

<sup>237</sup> TEX. NAT. RES. CODE ANN. § 33.103.

<sup>238</sup> TEX. PARKS & WILD. DEP’T., *supra* note 214, at 7.

<sup>239</sup> *Id.*

<sup>240</sup> TEX. NAT. RES. CODE ANN. § 51.126.

<sup>241</sup> *Id.*

<sup>242</sup> TEX. PARKS & WILD. DEP’T., *supra* note 222, at 7.

<sup>243</sup> *Id.*

<sup>244</sup> 31 TEX. ADMIN. CODE § 58.353(b).

proposed permitted area to take comment on the proposed project.”<sup>245</sup> The notice of this public meeting will be published by TPWD in print or electronically in a newspaper of general circulation in the area closest to the project at least two weeks prior to the meeting.<sup>246</sup> The permit applicant is responsible for the costs of the advertisements, and TPWD will not issue the final COMP if it does not receive payment for the advertisement.<sup>247</sup>

Unlike Washington and Maryland, the agency that issues submerged land leases is GLO and not DNR. When granting a lease, GLO does not hold a public notice and comment period.<sup>248</sup> The agency only analyzes the information provided by the applicant and decides whether it will issue the submerged land lease for aquaculture activities on state-owned lands.<sup>249</sup> If a lease is granted by GLO, the applicant has to present evidence to TPWD of that lease along with the other permits and authorizations required for that specific oyster aquaculture activity.<sup>250</sup> Once TPWD has that information, it will then publish the permit application for public comment.<sup>251</sup> The regulations do not establish the length of the comment period.<sup>252</sup> However, for leases that are going to be located in public waters, like the commercial lease, TPWD is required to hold a public information meeting in the city or municipality closest to the project, and notification of the meeting must be provided at least two weeks in advance.<sup>253</sup> Thus, similar to Maryland, Texas mandates that a public information meeting be held as part of the public participation process,<sup>254</sup> but in Maryland that meeting will only be held if an interested citizen requests it within the 30-day public notice period.<sup>255</sup> The specific process for appealing a final COMP is not mentioned in TPWD regulations and further guidance is needed on this matter. Since the approval of the final COMP is dependent on the issuing of other permits from the

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<sup>245</sup> *Id.* § 58.355(c).

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> TEX. NAT. RES. CODE ANN. § 51.126.

<sup>249</sup> *Id.*

<sup>250</sup> TEX. PARKS & WILD. DEP’T., *supra* note 230, at 7.

<sup>251</sup> 31 TEX. ADMIN. CODE § 58.353(b).

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* § 58.355(c).

<sup>254</sup> *Id.* § 58.353.

<sup>255</sup> MD. CODE ANN., NAT. RES. § 4-11A-09(g)(2)(iii).

aforementioned agencies,<sup>256</sup> appeals procedures are dependent on the corresponding agencies' regulatory frameworks.

Although the public participation process in Maryland occurs in the context of an application for an aquaculture lease, and in Texas it is done as part of the permitting process, the two processes have somewhat the same goal. Both Maryland DNR and TPWD will examine the public comments to determine if there are factors they had not previously contemplated that could cause either the denial of a lease or permit, respectively. However, while the end goal of the public comment period is the same in both states, the effect is completely different. As discussed, the Maryland comment period not only gives interested parties a chance to be heard, but it also triggers a process that is very different from typical notice and comment periods. When an interested party presents a protest in Maryland, it triggers an adjudicatory process that is heard by OAH, and DNR has the burden of presenting proof as to why the lease application is lawful and should be approved, while the protestant needs to present proof of the illegality of that lease.<sup>257</sup> In Texas, the comments submitted in the public comment period of the COMP permitting process do not trigger adjudication within the agency and are addressed internally by TPWD, the agency with the expertise in oyster aquaculture matters in the state. Consequently, individuals do not have to allege that they will be specially aggrieved by the proposed oyster aquaculture operations.

## V. CONCLUSION

There is significant diversity throughout the U.S. in the degree of process afforded to protestants seeking to stop shellfish aquaculture leases from being issued. In Maryland, despite a desire on the part of the legislature to strengthen the commercial oyster aquaculture industry and the creation of a streamlined aquaculture lease application process, the increase in lease applications have sparked a surge of lease protests in the state. Although the process for the approval of a new aquaculture lease is designed to have a quick turnaround, the filing of a protest triggers a unique administrative adjudicatory process that is subject to judicial review. And so, a process intended to expedite the issuing of leases can become very time consuming and costly to those who wish to engage

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<sup>256</sup> TEX. PARKS & WILD. DEP'T., *supra* note 230, at 7. The other agencies include the Texas Commission on Environmental Quality, Texas Department of State Health Services, Texas Department of Agriculture, and Army Corps.

<sup>257</sup> Historic Sotterley, *supra* note 41.

in shellfish aquaculture in Maryland. The proliferation of protests throughout Maryland undermines the success of the state's oyster aquaculture industry—in direct contradiction to the stated goals of the statutory framework.

This article analyzed the purpose of the shellfish aquaculture lease protests in Maryland and the standing requirements for bringing a protest. To have standing to protest a new shellfish aquaculture lease, a protestant must satisfy two statutory requirements. The first is to file the protest within the thirty-day period prescribed by law. The second dictates that only persons who have an interest that differs from the general public can file a protest. In the absence of instruction from the legislature, decisions by Maryland's courts or even guidance from DNR about what factors should be taken into consideration to determine whether and when someone has standing to protest a new lease, Maryland's property-owner standing doctrine is a useful framework to aid in this determination.

As discussed above, from the plain language of the statute, it is reasonable to conclude that the General Assembly recognized that owners of property located directly in front of the proposed lease location are the most likely to be affected by the approval of the new lease, which makes them *prima facie* aggrieved property owners. Protestants who do not own property directly in front of the proposed lease, however, will not be considered to automatically have standing and must claim additional 'plus factors' to show that the proposed lease will specially aggrieve them.<sup>258</sup> Following the analysis by OAH in the *Clark* case, it can be concluded that in the two-tiered test to determine special aggrievement, the proximity requirement is less strict and protestants could have standing if their property is merely in the "immediate area" of the proposed lease.<sup>259</sup> Regarding the second part of the test, standing is afforded to protestants who claim that their interests (e.g., enjoyment of their property or ability to harvest wild oysters) "may be affected"<sup>260</sup> by the proposed lease.

The last section of this article provided an illustrative analysis between the public participation framework in Maryland's commercial shellfish aquaculture leasing, permitting, and protest processes to the frameworks in Washington and Texas. Washington's shellfish aquaculture regulatory framework is one of the oldest in the country. Unlike Maryland, Washington's shellfish aquaculture permitting process directly involves multiple permits and authorizations from

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<sup>258</sup> *Ray v. Mayor and City Council of Baltimore*, 59 A.3d 545, 550 (Md. 2013).

<sup>259</sup> *Clark Adjudication*, *supra* note 59, at 15.

<sup>260</sup> *Id.*

different state and county-level agencies. Similar to Maryland's DNR, the agency in charge of approving a lease to engage in aquaculture activities in state-owned land is WA DNR, but the state's involvement in the leasing process for shellfish aquaculture is completely different. Furthermore, Washington's public participation framework in the shellfish aquaculture leasing and permitting process is very different from Maryland's. When WA DNR grants a lease for state-owned aquatic lands, there is no separate public notification and participation process. The only opportunities for public participation are through the public notice and comment period held at the county level and at the state and federal level within the thirty-day joint public and notice period held by the Army Corps and the Department of the Ecology. In addition, a unique characteristic of Washington's public participation process is that, due to existing treaty rights, the permit applicant and the state and federal agencies involved in the authorization process, are required to notify, and seek consensus with Native American Tribes who harvest in the area of the proposed shellfish aquaculture site.

Different from both Maryland and Washington, Texas has just begun to issue new commercial oyster aquaculture leases after a thirty-year moratorium. The application to engage in shellfish aquaculture in the state of Texas requires multiple permits issued separately by different agencies. When the leasing of state-owned aquatic lands is required to engage in aquaculture activities, the approval of a Final COMP by TPWD is dependent upon the issuing of the submerged land lease by GLO. After the applicant obtains all the required permits and the lease, TPWD will publish the permit application for public comment before issuing the Final COMP. For commercial shellfish aquaculture leases that are going to be in public waters, TPWD is required to hold a public information meeting in the city or municipality that is closest to the project.

After analyzing Maryland, Washington, and Texas's shellfish aquaculture permitting leasing and public participation processes, the state with the most straightforward application process is Maryland. Maryland's state application process is the simplest mainly because applicants only directly interact with MD DNR. On the other hand, people interested in engaging in shellfish aquaculture in Washington or Texas must be permitted by multiple state and county agencies, which could cause great delays at each step in the process.

Even though Maryland's application process is designed to be faster than Texas and Washington's, the process around public protests in Maryland can and does significantly delay and deter. Due to the unique characteristics of a protest, it can take many months or even years for a lease applicant to be able to obtain their

shellfish aquaculture lease. This issue certainly is detrimental for lease applicants. It also could require a great deal of state resources.

In order to simplify the public participation component in Maryland, the statute should be amended to eliminate protests, and instead, implement a public participation approach similar to Texas. This approach involves modifying Maryland's public participation to a typical notice and comment procedure. Unlike what happens under Maryland's current protest framework, if Maryland were to modify its process, when an individual submits a comment to DNR, it would not trigger an adjudication process. Rather, the commenting party's statement would be considered internally by DNR. This change will still guarantee that Maryland's citizens' concerns are being heard and considered by DNR—the agency with the expertise to resolve controversies around shellfish aquaculture leasing.

Furthermore, to protect citizen's property rights, the statute should also be amended to outline an appeal process to newly approved commercial shellfish aquaculture leases by DNR. An internal review board should be created within DNR for these purposes. In addition to the commenting period, the statute already contemplates that public participation meetings be held when requested. Public participation meetings are also great opportunities for citizens to voice their concerns and have their questions directly answered by DNR. Finally, to sustain Maryland's intended growth in its oyster aquaculture industry, the public participation process around leasing should be modified to an approach that is consistent with the current statutory framework.