

Leases, Permits, and Other Legal Requirements

Most shellfish farming takes place on public land – whether in bays or estuaries, shallow areas near shore, or deeper ocean waters. This means farmers have to work with the state or federal government when setting up their aquaculture operations. In addition, shellfish farmers may face additional hurdles, including other federal, state, and local requirements, and also face the risk of theft.

Public Rights

The modern legal concept that certain lands and waters should be held in trust for the public to access for fishing, navigation, and commerce has its roots in Rome. Under Roman law, the public was entitled to approach the seashore and use the banks of the rivers and the seashore. The legacy of this Roman practice is known in the U.S. as the “Public Trust Doctrine.” Here in the U.S., coastal states hold the public title to submerged lands under navigable waterways for the benefit, use, and enjoyment of all citizens.

In 1953, the United States Congress enacted the Submerged Lands Act, which gives coastal states jurisdiction over a region extending 3 nautical miles seaward from the baseline, commonly referred to as state waters. The exception to this is Texas and the Gulf Coast of Florida, whose state waters stretch out to 9 nautical miles based on their historic boundaries before becoming states. Areas beyond these state waters out to 200 nautical miles are regulated by the federal government.

Finding the Right Plot

As a result, those seeking to engage in shellfish aquaculture must first obtain permission from the landowner – either the state or federal government – to conduct activities on public land. This permission most often comes in the form of a lease, but may also be called a permit or license depending on the state.

With shellfish aquaculture, a shellfish farmer is essentially renting coastal land from the state or federal government for the purposes of operating a shellfish farm. In a few states, especially in New England, shellfish aquaculture leasing is handled by local governments.

Renting Public Lands

Like other real property, the rental of submerged land for shellfish aquaculture often comes with a fee, which varies by state. Similar to a landlord who can prohibit pets on the property or limit the number of people living in an apartment – the agency leasing submerged lands for shellfish aquaculture can impose lease conditions. Among other things, these conditions can include restricting the type of shellfish aquaculture that is conducted or gear that is used and requiring operators to post a bond or purchase an insurance policy to cover the costs of any necessary clean-up or restoration at the end of the lease.

Some states don’t have leasing frameworks for shellfish aquaculture, but several of those states are working to build such a framework. For example, Georgia enacted new legislation this year to legalize commercial oyster farming in the state. Texas and North Carolina also passed new lease-related legislation this year.

Other Authorizations

In addition to obtaining the right to use the land itself, shellfish farmers often need to apply for a variety of other permits under federal and state environmental and food safety laws. Depending on the size and location of the farm, as well as the type of gear and techniques used, farmers may need to get a federal permit from the U.S. Army Corps of Engineers, Environmental Protection Agency, or Coast Guard.

Farmers may also need shellfish harvester, processor, wholesaler, or transport licenses and permits to harvest, transport, and sell their shellfish. These permits and licenses help to ensure that shellfish that enters the market is safe to eat. Farms will be subject to inspection by agency personnel for enforcement purposes.

Farmers may also have to comply with local zoning codes in the towns where they plan to lease. Whether aquaculture is an allowed use in these various zones will vary by town. Some towns, for example, prohibit the use of private docks for commercial purposes. In such a situation, a shellfish farmer would need to obtain special permission, known as a variance, to offload shellfish at that location.

Some of these permit applications may trigger public hearings requirements which can draw attention to shellfish farming operations, and in some cases community opposition, as the proposed expansion of Spinney Creek Shellfish in Maine shows.

Risk of Theft

Farmers who make it through the leasing and permitting process can then start working to grow and sell shellfish. But - as if the challenges of growing shellfish weren't enough - farms can be easy victims for theft since the farms are often on public property. In Maryland in 2016, a man faced felony charges for stealing thousands of dollars worth of shellfish from a lease and dumping the evidence in the water by his house. More recently, thieves are now facing felony charges from stealing 40,000 oysters from Pensacola Bay Oyster Co. in the Florida panhandle in July, selling some of them, but destroying the majority once news of the theft was released.

Listen to the full episode for more details on the who, what, where, why, and how of shellfish aquaculture!

Keywords: offshore, lease, permit, license, Public Trust Doctrine, Submerged Lands Act

Resources:

- NOAA Office for Coastal Management- Submerged Lands Act:
<https://coast.noaa.gov/data/Documents/OceanLawSearch/Summary%20of%20Law%20-%20Submerged%20Lands%20Act.pdf>
- University of Oregon School of Law- The Public Trust Doctrine- A Primer:
https://law.uoregon.edu/images/uploads/entries/PTD_primer_7-27-15_EK_revision.pdf
- NSGLC Shellfish Aquaculture Webinar Series- Evolving Regulatory Structure:
<http://nsglc.olemiss.edu/webinars/summer2019/index.html>