

Introduction: "The time has come," the Walrus said, "to talk of other things."

Stephanie Otts: This is a podcast, not about shoes and ships and sealing wax, but about the who, what, where, why and how of shellfish aquaculture, including the many different legal challenges that can arise. We're the National Sea Grant Law Center and we invite you to sit down and get ready for a wave of knowledge.

Stephanie Otts: Hi, I'm Stephanie. I'm the Director of the National Sea Grant Law Center.

Cathy Janasie: Hi, I'm Cathy. I'm a Senior Research Counsel at the National Sea Grant Law Center.

Amanda Nichols: And I'm Amanda. I'm the Ocean and Coastal Law Fellow with National Sea Grant Law Center.

Stephanie Otts: You are listening to Law on the Half Shell.

Stephanie Otts: In this episode we explore how shellfish farmers navigate the leasing and permitting process for their operations. As we discussed in our first episode, most of the time shellfish farming takes place on public land, whether in a bay or an estuary or in shallow areas near shore or even out in deeper ocean waters.

Stephanie Otts: The modern legal concept that certain lands and waters should be held in trust for the public to access for fishing, navigation, and recreation has its roots in Rome. The Institutes of Justinian, which was a Roman legal code stated quote, "By the law of nature, these things are common to mankind, the air, running water, the sea, and consequently the shores of the sea."

Stephanie Otts: So under Roman law, the public was entitled to approach the seashore and use the banks of rivers and the seashore for their purposes, they were free to beach vessels, unload cargo, maybe place cottages and dry and haul nets from the sea onto the shore. And so it was recognized that this area was needed to be used by the public to further these commercial purposes of fishing and maritime commerce.

Amanda Nichols: In the legacy of this Roman practice is actually called the Public Trust Doctrine. So here in the United States, coastal states hold the public title to submerged lands under navigable waterways for the benefit, use, and enjoyment of all citizens.

Amanda Nichols: And in 1953 the United States Congress enacted the Submerged Lands Act, which gives coastal states jurisdiction over a region extending three nautical miles seaward from the baseline, which is commonly referred to as state waters.

Amanda Nichols: And nautical miles, if you don't know, are the units of distance used for air and sea travel. So one nautical mile is equal to approximately 2,025 yards or 1.15

miles. And a little bit of fun information, nautical miles are actually based on the circumference of the planet earth. So if you were to cut the earth in half at the equator, you could pick up one of the halves and look at the equator as a circle. And if you divided that circle into 360 degrees with each degree then divided into 60 minutes, each minute of arc would be equal to one nautical mile.

Stephanie Otts: State waters typically stretch from the shore out to three nautical miles.

Stephanie Otts: This is with the exception of Texas and the Gulf coast of Florida, whose state water stretch out to nine nautical miles.

Amanda Nichols: But wait, why do Texas and Florida get more?

Stephanie Otts: Yeah, so due to a quirk of history, so it has to do with their historic boundaries. When Congress passed the Submerged Lands Act back in 1953 all five Gulf States, so Florida, Alabama, Mississippi, Louisiana, and Texas went to court seeking legal recognition that their historic boundaries extended beyond the three nautical miles into the Gulf of Mexico.

Stephanie Otts: So they wanted more territory. Only Florida and Texas were successful in establishing these claims. In the case of Florida, the US Supreme Court held that the state was entitled to nine nautical miles along the Gulf of Mexico, because the Florida constitution explicitly set forth that limit when it was readmitted to the union in 1868 after its succession during the Civil War.

Stephanie Otts: Texas was also able to convince the US Supreme Court that it had historic claim to nine nautical miles by arguing that it had always asserted that boundary going back as far as when it was part of Spain, then Mexico. And finally, while it was its own independent nation, the Republic of Texas. And this fact was crucial to their arguments because under the Submerge Lands Act, states are able to keep control over the waters over which they had always asserted jurisdiction.

Amanda Nichols: And as a result of the public trust doctrine, individuals and companies 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. And this permission most often comes in the form of a lease, but may also be called a permit or license depending on the state you're in.

Amanda Nichols: So at the most basic level, a lease is simply a contract that outlines the terms under which one party agrees to rent property owned by another party for a certain purpose. And 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.

Amanda Nichols: And in a few states, especially in New England, shellfish aquaculture leasing is handled by local governments. For example, in Connecticut, local shellfish

commissions handle leasing in town waters and they're usually fees that are associated with leases, but these fees vary by state.

Amanda Nichols: So for example, Delaware charges a \$300 lease permit application fee. And then if the application is approved, lessees must then pay \$100 per acre per year to the state in order to keep their farms operational. In Maine, the application fee for a standard shellfish lease is \$1,500 and the annual rent is \$100 per acre per year. And in Alaska, the state actually has a table of fees for shellfish aquaculture operations that covers necessary expenses such as wild stock surveys, sanitary surveys, application fees, and annual lease fees. The fees here differ depending on what type of aquaculture is being conducted, as well as how large the lease is.

Stephanie Otts: And similar to a landlord who can prevent their renters from having pets on their property or limit the number of people living in an apartment, the agency leasing submerged lands for shellfish aquaculture can also impose lease conditions. So states may restrict the type of shellfish aquaculture that is conducted within the leased area or the type of gear that is used.

Stephanie Otts: A state, for example, may decide to only allow on bottom aquaculture or prohibit the use of dredges. Some states require shellfish farmers to post a bond in order to obtain a lease, which is similar to a security deposit or to purchase certain insurance policies to ensure that funds are available to cover the cost of any necessary cleanup or restoration at the end of the lease term.

Stephanie Otts: Individuals working on shellfish farms may also need to have harvester licenses or permits to harvest shellfish and depending on the activities they are involved with, may also need transport or other permits to move stock on and off the farms. So as a condition of the lease, the state is saying we want to kind of have some control over who is conducting operations in that lease area. Farms will also be subject to inspection by agency personnel for enforcement purposes.

Amanda Nichols: But some States don't have leasing frameworks for shellfish aquaculture. However, several of those states are working to build those frameworks. So for example, Georgia enacted new legislation this year to legalize commercial oyster farming in the state. Actually, a little bit of a fun fact. In the early 20th century, Georgia produced as much as 8 million pounds of oysters every year, in order to sustain its booming canned oyster industry, but by the 1940s overharvesting and a declining appetite for canned oysters led to the industry's demise.

Amanda Nichols: So in order to help revive the local oyster business, the state introduced a major piece of legislation that establishes a framework for harvesters to start and operate oyster farms. Prior to the new legislation only wild oyster harvesting was legal in Georgia. State officials are hoping that the legalization of oyster farming could create job opportunities along the coast and give current shellfish harvesters an additional revenue stream. So we'll see as time goes on, how well that pans out.

- Stephanie Otts: Texas and North Carolina also passed new lease-related legislation this year. Texas legislation will become law on September 1st, 2019 and allows oysters to be farmed for their pearls, shells, and meat. The passage of this legislation requires the Texas Park And Wildlife Commission to adopt rules that establish a program to regulate the commercial process of growing oysters.
- Stephanie Otts: Interestingly, prior to the passage of this law, Texas was the only coastal state in the nation that didn't allow commercial oyster aquaculture off its coast. Though the state permitted private on bottom oyster aquaculture in the past, it implemented a leasing moratorium in 1989 that prevented any submerged lands from being privately leased for new shellfish aquaculture activities and all off-bottom operations, and on-bottom operations with cages were prohibited, up until the passage of this new legislation.
- Stephanie Otts: North Carolina's legislation was signed into law on June 21st and makes several critical changes to the state shellfish aquaculture leasing program. Notably, it authorizes the state's Division of Marine Fisheries to establish one or more shellfish aquaculture enterprise areas for both bottom and water column leases, as well as related permitting and leasing processes.
- Stephanie Otts: So water column leases are leases that allow someone to use the water column for aquaculture. So this is for off-bottom aquaculture, where shellfish may be hanging in bags from racks, so the shellfish themselves are not touching the bottom of the ocean. The enterprise areas are meant to provide a faster or more streamlined permitting process for shellfish aquaculturalist while also reducing the number of potential user conflicts and lease related lawsuits.
- Amanda Nichols: 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. So depending on the size and location of the farms, as well as the type of gear and techniques used, farmers may need to get a federal permit from the US Army Corps of Engineers, the Environmental Protection Agency, or even the Coast Guard.
- Amanda Nichols: And these permits help ensure that the farm does not pose navigational hazards or discharge pollutants into surrounding waters. And as mentioned a little bit earlier, farmers may need shellfish harvester, processor, wholesaler, or transport licenses and permits in order to harvest, transport, and sell their oysters, clams, and mussels. And these permits and licenses are meant to ensure that shellfish that enters the market is safe to eat. Farmers may also have to comply with local zoning codes in the towns where they plan to lease.
- Amanda Nichols: So under local land use codes, coastal property is usually classified into one of several general zoning categories, including residential, commercial, or industrial. And whether aquaculture is an allowed use in these various zones will vary by town. Local zoning codes may place restriction on the size and number of accessory buildings such as sheds that could be placed on the property to support the farm and some towns may do such things as prohibit the use of

private docks for commercial purposes. And in such a situation, a shellfish farmer would need to obtain special permission, known as a variance, to offload shellfish at that location.

Stephanie Otts: Some of these permit applications that shellfish farmers may have to submit could trigger a public hearing requirements under the law, which can draw attention to the shellfish operations and in some cases even community opposition.

Stephanie Otts: For example, Florida law requires notification of riparian property owners, so property owners that are owning the coastal property along where the shellfish aquaculture will take place and a notice must be published in the local newspaper. If substantial objections are received, particularly from affected upland property owners, a public meeting may need to be scheduled prior to a decision being made on the lease.

Stephanie Otts: Upland owners can also raise legal challenges against shellfish aquaculture activities that they may find inconvenient or unsightly. For example, Spinney Creek Shellfish in Maine was recently forced to withdrawal its application to expand oyster aquaculture operations, after some unhappy neighboring property owners debated the expansion for over 10 months.

Stephanie Otts: The property owners cited concerns with reduction in quality of life, the environment, riparian safety, and the appearance of floating gear. The shellfish farm argued, you know, that there would not be these impacts from their operation, but the attention and expense in working through the process resulted in the farm deciding it wasn't worth going through with the expansion.

Amanda Nichols: Farmers who make it through the leasing and permitting process can then start working to grow and deliver shellfish to our plates. But as if the challenges of growing shellfish weren't enough, farms can be easy victims for theft. So a couple of examples of this, in Maryland in 2016 and man actually stole thousands of dollars worth of shellfish from a lease and dumped the evidence in the water by his house.

Amanda Nichols: After he was discovered and caught, the state charged him with a felony that could have subjected him to 25 years in prison and a \$27,000 fine. And even more recently, thieves stole 40,000 oysters from Pensacola Bay Oyster Company in the Florida panhandle in July of 2019 and they sold some of them but destroyed the majority once news of the theft was released. The thieves even sunk their boat trying to transport too many stolen oyster cages to shore. And three men and one woman were eventually arrested and are now facing felony charges.

Stephanie Otts: How do you even carry 40,000 oysters from a farm?

Amanda Nichols: You don't, you sink your boat.

Stephanie Otts: Sink your boat.

Stephanie Otts: Join us next time as we discuss the impact of freshwater quality and quantity on shellfish aquaculture. This podcast is a production of the National Sea Grant Law Center at the University of Mississippi School of Law. It is made possible in part by funding from the NOAA National Sea Grant College Program. The statements, findings, conclusions, and recommendations are those of the speakers and do not necessarily reflect the views of NOAA or the US Department Of Commerce. Editing and production assistance was provided by Kerrigan Herret, a senior journalism student at the University of Mississippi. Thanks for listening.