

## NEW YORK

### Shellfish Management At a Glance

The following provides a brief reference to regulatory permitting programs applicable to shellfish restoration in New York. Related permitting requirements are addressed in subsequent sections.

#### A. Coastal Program

- Responsible Agency: New York Department of State, Office of Planning and Development
- Relevance: Handles federal consistency reviews and provides funding and technical support to encourage local waterfront revitalization plans.
  - Component: Article 42 of the Waterfront Revitalization of Coastal Areas and Inland Waterways Act
- Website: <http://www.dos.ny.gov/opd/programs/WFRevitalization/coastmgmtprog.html>

#### B. Submerged Lands

- Responsible Agency: New York Office of General Services, Real Estate Development Program
- Relevance: Issues leases, easements and permits for uses of land underwater.
- Website: <http://ogs.ny.gov/BU/RE/LM/EGLP.asp>

#### C. Fisheries Management

- Responsible Agency: New York State Department of Environmental Conservation, Bureau of Marine Resources
- Relevance: Manages shellfish harvesting and issues harvesting permits and licenses.
- Website: <http://www.dec.ny.gov/outdoor/345.html>

#### D. Shellfish Aquaculture

- Responsible Agency: New York State Department of Environmental Conservation, Bureau of Marine Resources – Shellfish Unit
- Relevance: Regulates marine aquaculture operations in the state.
- Website: <http://www.dec.ny.gov/index.html>

#### E. Shellfish Sanitation

- Responsible Agency: New York State Department of Environmental Conservation, Bureau of Marine Resources
- Relevance: Monitors shellfish growing areas for public health concerns and manages harvest in accordance with the National Shellfish Sanitation Program Guidelines.

- Website: <http://www.dec.ny.gov/outdoor/345.html>

## Submerged Lands Permitting

Shellfish restoration projects may require leasing of state-owned submerged lands. This section discusses the role of state-owned submerged lands, availability of King's or Crown grants, and other aspects of leasing submerged lands for restoration projects.

### A. State-Owned Submerged Lands

- The State of New York refers to submerged lands as “lands under water.” The state claims title to the submerged lands, from mean high water to three nautical miles seaward into the Atlantic Ocean, Long Island Sound, and other navigable bays.
- Public Trust Rights: Navigation, commerce, fishing, bathing, and recreation; environmental protection; and access to the navigable waters of the state.<sup>189</sup>
- Riparian Rights to Shellfish: No provisions found granting riparian owners special rights to shellfish.

### B. Leasing Process

- *Generally:* The Office of General Services (OGS) may grant fee title to land underwater to adjacent landowners to promote commerce; for the beneficial enjoyment of the owners; for agricultural purposes; for a public park, beach, highway; or recreation or conservation purposes.<sup>190</sup> Grants in land underwater in fee simple are limited to exceptional circumstances.<sup>191</sup> The Office of General Services may also lease land underwater to the owner of adjacent upland or to others with the consent of adjacent upland landowners for terms up to forty years.<sup>192</sup>
  - When making such grants and leases, the OGS shall reserve such interests or attach such conditions as necessary to preserve the public interest in use of state-owned lands underwater.
  - Structures and fill may not be placed on state-owned lands underwater without authorization under a lease, easement, permit or other interest issued by the OGS.

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<sup>189</sup> N.Y. PUBLIC LANDS LAW § 75.

<sup>190</sup> *Id.* § 75(7)(a).

<sup>191</sup> N.Y. COMP. CODES R. & REGS. tit. 9, § 270-4.1.

<sup>192</sup> N.Y. PUBLIC LANDS LAW § 75(7)(a).

- *Shellfish Cultivation Leases*: The New York State Department of Environmental Conservation (NYSDEC) Marine Resources Bureau may lease state-owned underwater lands for the cultivation of shellfish. The written approval of the OGS is required for the lease of land within 500 feet of the high water mark.<sup>193</sup>
  - The following lands may not be leased by NYSDEC:
    - Lands where there is a presence of shellfish in sufficient quantity to support significant hand raking or tonging harvesting;
    - Lands where the leasing will result in a significant reduction to established commercial finfish or crustacean fisheries;
    - Lands where bay scallops are produced regularly on a commercial basis; and
    - Lands underwater of Gardiner's and Peconic bays and the tributaries thereof between the westerly shore of Great Peconic bay and an easterly line running from the most easterly point of Plum Island to Goff point at the entrance of Napeague harbor.
  - Lands under water of Gardiner's and Peconic bays in the county of Suffolk, except underwater lands within 1,000 feet of the high water mark, have been ceded to Suffolk County. Suffolk County may lease such lands for shellfish cultivation. Leases may only be issued within shellfish cultivation zones designated on maps approved by the county.<sup>194</sup>
    - Within Suffolk County, the Town of Islip leases Town-owned Bay bottom for shellfish cultivation through its Bay Bottom Leasing Program.<sup>195</sup>

### C. King or Crown Grants

New York courts recognize some pre-revolutionary patents of underwater land to private parties.<sup>196</sup> The New York courts have found that these properties are only subject to the public right of navigation across the property. The public rights of fishing and hunting do not apply to these lands. TNC possesses one of these properties in Great South Bay.

### D. Conservation Leasing

The OGS may make a grant of underwater land for conservation purposes. Such grants are limited to a county, city, town, or village.<sup>197</sup> The term conservation is not defined, so it is not clear whether shellfish restoration projects would qualify.

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<sup>193</sup> N.Y. ENVTL. CONSERV. LAW § 13-0301(1).

<sup>194</sup> *Id.* § 13-0302.

<sup>195</sup> <http://www.townofislip-ny.gov/departments/environmental-control/shellfish-hatchery>.

<sup>196</sup> See, e.g., *DiCanio v. Inc. Vill. of Nissequogue*, 189 A.D.2d 223, 225, 596 N.Y.S.2d 74, 76 (App. Div. 1993).

<sup>197</sup> N.Y. PUBLIC LANDS LAW § 75(10).

## Permitting Shellfish Restoration

### A. Regulating Agencies

- New York State Department of Environmental Conservation (DEC)
- U.S. Army Corps of Engineers (USACE)

### B. Permitting Process

Restoration projects will generally require permitting for use of environmental resources, sovereign submerged lands, and federal dredge and fill. To simplify the permitting process, NYSDEC and the USACE developed a joint application form.<sup>198</sup>

- **Note:** The “Joint Application for Permit” is a joint application, not a joint permit. There is no designated lead agency. Applicants are required to submit complete applications to each agency involved.

### Tidal Wetlands Permit:

Shellfish restoration projects in or adjacent to tidal wetlands will require a Tidal Wetlands Permit from the NYDEC. Tidal wetlands include all the salt marshes, non-vegetated as well as vegetated flats, and shorelines subject to tides.<sup>199</sup>

- Projects taking place in coastal waters more than six feet below mean low water do not require a Tidal Wetlands Permit. Such projects, however, may require a Water Quality Certification, culture permit, or lease or other form of authorization depending on the scale and scope of the project.
- Placement of fill in a tidal wetland is generally classified as a major project. Notice of all major projects must be published in both the Environmental Notice Bulletin (ENB) and a designated local newspaper to allow for public review.

### USACE Permitting:

The New York District of the USACE oversees federal dredge and fill permitting in New York’s coastal waters. Use of NWP 27 is authorized in New York with conditions.<sup>200</sup>

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<sup>198</sup> Available at:

<http://www.nan.usace.army.mil/Portals/37/docs/regulatory/geninfo/Permitapplications/jointapp%20Feb%202013.pdf>

<sup>199</sup> N.Y. ENVTL. CONSERV. LAW § 25-0103(1).

<sup>200</sup> [http://www.nan.usace.army.mil/Portals/37/docs/regulatory/geninfo/natp/NWP\\_PN\\_30MAY12.pdf](http://www.nan.usace.army.mil/Portals/37/docs/regulatory/geninfo/natp/NWP_PN_30MAY12.pdf)

- No activity may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWP 4 and 48, or is a shellfish seeding or habitat restoration activity authorized by NWP 27.
- NYDEC conditions for NWP 27 restrict its use to:
  - Restoration projects conducted with the oversight of a federal or state natural resource agency, or a County Soil and Water Conservation District.
  - Demonstration projects involving less than one acre of water.
  - Fill activities for shellfish restoration which do not result in an alteration of existing substrate and benthic habitat.
- In addition, there is a New York district regional condition for Essential Fish Habitat waters. Within such waters, any activity involving shellfish seeding, such as the placement of shell material or any other habitat development or enhancement, is restricted to shellfish species that are native to that waterbody.

#### C. Shellfish Restoration Permitting Snapshot

- Tidal Wetlands Permit: Shellfish restoration projects in or adjacent to tidal wetlands will require a Tidal Wetlands Permit.
  - Submit Joint Application for Permit to NYSDEC.
  - Education and research activities not involving material alteration of the area are exempt.
  - Projects at depths greater than six feet below mean high water are exempt from this permitting requirement.
- State-owned Lands Underwater Lease: Shellfish restoration projects on state-owned underwater lands will require a lease or other authorization from OGS.
  - Submit Joint Application for Permit to OGS.
- USACE Permitting:
  - NWP 27: Submit Joint Application for Permit to USACE. USACE will issue written approval to applicant if project qualifies.
  - Individual Permit: only needed if project does not fall within General Permit.

#### D. Research & Conservation Permitting

- NYDES has exempted some activities in tidal wetlands from permitting requirements.<sup>201</sup> Two exemptions are potentially applicable to shellfish restoration projects:

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<sup>201</sup> N.Y. COMP. CODES R. & REGS. tit. 6, § 661.5(b).

- Establishment of wildlife or scientific preserves not involving material alternation of the area involved.
- Educational and research activities not involving any material alteration of the area involved.

#### E. Restoration in Closed Waters

No provision was found expressly prohibiting shellfish restoration projects in closed waters.

## Protecting Existing Reefs and Restoration Projects

#### A. Reef Closure for Non-Public Health Concerns

No provisions were found authorizing the closure of shellfish beds for reasons other than public health concerns. DEC has authority to adopt regulations for closed areas for shellfish.<sup>202</sup>

#### B. Sanctuaries & Other Protected Areas

- Mashomack Preserve: 2,100-acre preserve 90 miles from New York with extensive salt marshes managed by The Nature Conservancy.
- According to NYSDEC personnel, some municipalities seed shellfish in uncertified waters to act as spawner sanctuaries. Other towns close town-owned underwater lands to harvest for management purposes and may re-open as “winter grounds” for harvest.

#### C. Other Tools for Protecting Shellfish Restoration Projects

- Fish pots and fish traps may not be used within 500 feet of an artificial reef.<sup>203</sup>

## Oyster Management Generally

The wild oyster fishery is managed by the NYSDEC. This section does not address oyster aquaculture which is also regulated by NYSDEC. New York also regulates the following other shellfish: clams, mussels, scallops, surfclam, and ocean quahogs.

#### A. Oyster Harvesting

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<sup>202</sup> See N.Y. ENVTL. CONSERV. LAW §§ 13-0323, 13-0325 and 13-0327.

<sup>203</sup> *Id.* § 13-0343-a(1).

This section details the general requirements for oyster harvesting, including licenses, seasons, and other relevant details.

- Season:
  - Oysters can be taken throughout the year in state waters. Seasonal restrictions may apply to town-owned underwater lands
- License:
  - Commercial: A digger's permit is required to take shellfish from state underwater lands for commercial purposes.
  - Recreational/Personal Use: No permit required.
- Harvesting Requirements:
  - Shellfish can only be taken from areas certified as open by NYSDEC.
  - Oyster requirements:
    - 3" minimum size unless cultured or transferred under a permit from NYSDEC.
    - ½ bushel daily limit for recreational, no limit on commercial harvest.
    - No mechanical means allowed. Dredge with sail allowed on state land and in some towns.
  - Additional local restrictions may apply.
- Replanting/reseeding requirements: None found. Replanting using seeds from out of state requires a shellfish health certificate to ensure that the imported seed does not contain relevant shellfish pathogens and parasites.

## B. Public, Private, and Natural Reef Distinctions

NYSDEC oversees regulation of public shellfish beds on state-owned underwater lands and private shellfish aquaculture leases.

NYSDEC also oversees the state's artificial reef program. Artificial reefs are defined as any "hard structure, deliberately placed in a marine or coastal water body for the purpose of imitating environmental conditions found on natural underwater rock outcroppings, shellfish reefs or coral reefs."<sup>204</sup>

## **Existing Shellfish Restoration Efforts**

### A. Government

- Billion Oyster Project: The New York City Department of Environmental Protection, NYSDEC, and the USACE are working with schools, businesses, nonprofits, and

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<sup>204</sup> *Id.* § 13-0360(1)(a).

individuals to grow oysters and restore oyster populations in New York Harbor.  
<https://www.billionoysterproject.org>

- The New York and New Jersey Baykeeper partnered with the Hudson River Foundation, New York City Parks, Bronx River Alliance, and the New York Harbor Schools to install 125 yds<sup>3</sup> of oyster reef in the lower Hudson River Estuary along with placement 100,000 oyster spat on shell in 2013.  
<http://nynjbaykeeper.org/resources-programs/oyster-restoration-program/>
- The Hudson River Foundation has been conducting up to five oyster restoration feasibility studies using 50 m<sup>2</sup> oyster plots to determine the probability of oyster restoration success, if larger projects were to be implemented. These projects have been moderately successful. Many of the oysters have been silted in or carried away by currents. All the sites are in waters closed to harvest.
- The Nature Conservancy owns 14,000 acres of water bottom in Great South Bay. Multiple spawner sanctuaries for hard clams have been created. Thousands of clams from Connecticut and New York from both wild harvest and hatcheries have been used to seed these sanctuaries.
- Scallop restoration has occurred in Peconic Bay on the eastern shore. Cornell Cooperative Extension of Suffolk County and Long Island University have partnered on some projects in Peconic Bay and have received funding from Suffolk County, New York.
- Towns and municipalities have conducted restoration and enhancement projects for oyster, hard clams, and scallops.
- Shelter Island Sanctuaries are stocked with 20,000 to 30,000 clams per acre.
- New York City Parks and Recreation has established a pilot oyster reef in Soundview Park on the Bronx River.

#### B. Non-government and Private

- Oyster Restoration Research Partnership: The NY/NJ Baykeeper, Hudson River Foundation, USACE, New York/New Jersey Harbor Estuary Program, and the Urban Assembly New York Harbor School have been working on research projects to see where oyster reefs can be viably placed in New York Harbor and the Hudson River.
  - A Final Report for Phase I of the project can be found here:  
[http://nynjbaykeeper.org/wp-content/uploads/2013/05/Grizzle\\_et\\_al\\_2011\\_ORRP\\_Phase\\_1\\_Report\\_03\\_29\\_2012\\_Printed.pdf](http://nynjbaykeeper.org/wp-content/uploads/2013/05/Grizzle_et_al_2011_ORRP_Phase_1_Report_03_29_2012_Printed.pdf)



- TNC has a restoration project in Peconic Bay on its Mashomack Preserve.
- SCAPE/Landscape Architecture won a design competition by Rebuild by Design/HUD after Hurricane Sandy to install oyster reefs off the shore of Staten Island to make the area more resilient.  
<http://www.rebuildbydesign.org/project/scape-landscape-architecture-final-proposal/>

## **Mitigation**

There are currently no programs in place for receiving mitigation credits for shellfish restoration in New York.